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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1972

72-141

In the Matter of the Application of HARRY GREENSEID, GEORGE PAPALEXIS, AUSTIN B. COX, SAM WEISS, ERNEST GUGGENHEIM, JOHN R. MURPHY, BENJAMIN WALLACK, ELMER HAUCK, JOHN LEONIDAS, ARTHUR RUSSELL, WILLIAM DONOVAN and MURRAY SOLOMON, individually and as Trustees of Local 11 Welfare Trust Fund,

Appellants,

v.

RICHARD E. STEWART, Superintendent of Insurance of the State of New York,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

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Appellants,

v.

RICHARD E. STEWART, Superintendent of Insurance of the State of New York,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

To the Honorable The Chief Justice, and Associate Justices of the Supreme Court of the United States:

The petitioners, HARRY GREENSEID, GEORGE PAPALEXAS, AUSTIN B. COX, SAM WEISS, ERNEST GUGGENHEIM, JOHN R. MURPHY, BENJAMIN WALLACK, ELMER HAUCK, JOHN LEONIDAS, ARTHUR RUSSELL, WILLIAM DONOVAN and MURRAY SOLOMON,

individually and as Trustees of Local 11 Welfare Trust Fund, respectfully pray that a writ of certiorari issue to review the order and judgment of the Court of Appeals of the State of New York entered in this proceeding on April 27, 1972.

OPINIONS BELOW

The Statement, Findings of Fact, Decision and Conclusions and Approval thereof by the Superintendent of Insurance of the State of New York was not officially reported. A copy is reproduced in the Appendix hereto. The opinion of the Appellate Division of the Supreme Court of the State of New York modifying the Statement, Findings of Fact, Decision and Conclusions and Approval by the Superintendent of Insurance of the State of New York was reported at 31 A.D. 2d, 454 and is reproduced in the Appendix hereto, as is the Order of said Appellate Division. The opinion of the Court of Appeals of the State of New York which modified the Order of the Appellate Division of the Supreme Court of the State of New York has not yet been reported. A copy of that Order is reproduced in the Appendix hereto. Appellants' motion to amend the Remittitur of the Court of Appeals was denied without opinion on June 8, 1972 and has not yet been reported. A copy of that Order is reproduced in the Appendix hereto.

JURISDICTION

The judgment of the Court of Appeals of the State of New York was entered on April 27, 1972. This petition for certiorari was filed within ninety (90) days of the judgment appealed from. This Court's jurisdiction is invoked under 28 U.S.C. 1257 (2).

STATUTORY PROVISIONS INVOLVED

United States Constitution, Sixth Amendment

In all criminal prosecutions, the accused shall enjoy the right...to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor,...

United States Constitution, Fourteenth Amendment

...No State shall make or enforce any Law which shall abridge the privileges or immunities of Citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the Laws....

New York State Insurance Law, Section 23

Whenever by the provisions of this chapter the superintendent is required to

give to any person a hearing.... Every such hearing shall be open to the public unless the superintendent, or the person authorized by him to conduct such hearing, shall determine that a private hearing would be in the public interest in which case the hearing shall be private. Every person affected shall be allowed to be present during the giving of all the testimony, and shall be allowed a reasonable opportunity to inspect all adverse documentary proof, to examine and cross-examine witnesses, and to present proof in support of his interest. Nothing herein contained shall require the observance at any such hearing of formal rules of pleading or evidence.

New York State Insurance Law, Section 24-1

The superintendent or any person conducting a hearing or investigation by his authority shall have power to subpoena witnesses, compel their attendance, administer oaths, examine any person under oath, and to compel any person to subscribe to his testimony after it has been correctly reduced to writing, and in connection therewith to require the production of any books, papers, records, correspondence or other documents which he deems relevant to the inquiry....

New York State Insurance Law, Section 37-e (2)

In any action or proceeding against the trustees of any employee welfare fund,

or against their officers, agents or employees, such report, or any part thereof, if published by the Superintendent, shall be admissible in evidence and shall be presumptive evidence of the facts stated therein.

New York State Insurance Law
Section 37-z (1)

The trustees of every employee welfare fund shall be responsible in a fiduciary capacity for all money, property or other assets received, managed or disbursed by them, or under their authority, on behalf of such fund.

New York State Insurance Law
Section 37-z (5)

The Superintendent may impose a penalty of not to exceed twenty-five hundred dollars upon any trustee or other officer, agent or employee of any employee welfare fund subject to this article or may remove such trustee, officer, agent or employee from office or employment, or both such penalty and removal, if after notice and a hearing he shall find that he has wilfully failed to comply with the requirements of this article. Any such action of the Superintendent under this subdivision shall be subject to judicial review.

New York State Insurance Law
Section 37-*l* (7 (a)

Any person who wilfully violates or causes or induces the violation of any provision of this article or any regulation hereunder shall be guilty of a misdemeanor.

QUESTIONS PRESENTED

1) Is Section 37 (e) of the New York State Insurance Law unconstitutional under the Sixth and Fourteenth Amendments to the United States Constitution in that it made hearsay evidence presumptive evidence against Appellants in a quasi criminal administrative proceeding?

2) Were Appellants denied due process of law by Respondent's finding a depletion of welfare fund assets based solely on hearsay evidence and without any substantial evidence to support the finding?

3) Were Appellants denied their rights under the Sixth and Fourteenth Amendments to the United States Constitution by the procedures adopted by the hearing officer, which prevented any meaningful inquiry into the relevance of the evidence admitted against them?

4) Was Appellant Solomon found guilty of willful violation of law, fined and removed from office without being accorded a fair hearing, the right to confront his accusers and due process of law?

STATEMENT OF THE CASE

Appellants are all employer or union trustees of Local 11 Welfare Trust Fund, a jointly administered employee welfare fund, organized under Article 3-A of the New York State Insurance Law, which statute regulates welfare funds and their trustees. That statute imposes criminal penalties against any trustee who wilfully violates or causes or induces the violation of any provision of Article 3-A (New York State Insurance Law, Section 37-1 (7) (a)), including Section 37-1 (1) of Article 3-A, which imposes a fiduciary duty upon welfare fund trustees.

The New York State Superintendent of Insurance commenced a proceeding against the Appellant trustees, requiring them to show cause at a hearing conducted by a deputy superintendent of the New York State Insurance Department, wherein it was charged that the Appellants wilfully failed to comply with their fiduciary responsibilities under Section 37-1 (1) of the New York State Insurance Law.

The Citation charged the various Appellants with wilful, wrongful and negligent failure to comply with the requirements of Section 37-1 (1) of the New York Insurance Law (51,2)* resulting in a depletion of the assets of the welfare fund. The major derelictions of duty specified were that improvident contracts had been

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* References are to pages in the Appendix hereto.

made with a certain doctor to render optical services to union members, that the rendering of such services was improperly supervised, that improper and insufficient records of such services were kept, and that the Welfare Fund was substantially depleted by overcharges for such services far in excess of what they should have cost. In effect, the trustees were charged with over-paying for the eye glasses. There was no claim or any suggestion that any of the trustees, none of whom received any compensation for their services, received any personal gain or benefit from the transactions.

The Departmental hearing resulted in Findings of Fact, a Decision and Conclusions (6-30), all of which were approved and adopted by the Respondent Superintendent of Insurance (29).

The hearing officer found the Appellant trustees guilty of charges of neglect and nonfeasance and of having caused the welfare fund to have suffered a depletion of its assets. The Appellant trustees were found jointly and severally liable for the total sum of $138,130.90 depleted welfare fund assets, in proportion to their respective periods of service as trustees. Trustee Solomon, who was the Welfare Fund's administrator, as well as a trustee, was found to have wilfully violated the statute and was ordered removed from both posts and fined the statutory maximum of $2,500.

The theory upon which the depletion Findings and assessment adopted by the hearing officer and Respondent were based,

was that there was a difference between the average cost per pair of glasses to the welfare fund under the contracts involved, and what they should have cost on the average. The theory, at the outset, ignored the fact that the welfare fund contracts involved called for optical services beyond the mere furnishing of eye glasses, such as free audio metric examinations, repair and adjustments to eye glasses, and free patient consultation with an opthalmologist should the initial examination disclose any abnormal condition or eye disease.

Respondent's sole evidence in support of what he claimed the eye glasses should have cost consisted of fifty-five reports made by Respondent's Examiners, on file with the Insurance Department, concerning what were baldly asserted to be other welfare funds supplying similar services (53,54). The fifty-five other welfare funds' reports did not constitute the total number of other welfare fund reports on file with the Department. The fifty-five reports were selected from a much larger group by a supervisor in the New York State Insurance Department and were given to Respondent's Examiner, Zaroff, who made no independent inquiries on his own. The introduction of the fifty-five reports as evidence of what eye glasses should have cost Appellant's Welfare Fund was strenuously objected to by Appellant's attorneys.

Respondent introduced testimony at the hearing, through Examiner Zaroff, based solely on the fifty-five other welfare fund reports submitted in evidence, that

the average cost per pair of eye glasses to those other funds was $6.19 per pair. This witness, Examiner Zaroff, testified that he had nothing to do with the actual preparation of those fifty-five reports or with the underlying Departmental examinations of those funds that led up to them. He admitted that he was not a statistician and stated that in computing the average cost per pair of glasses from the fifty-five selected welfare fund reports, he had merely taken the basic charge for lenses from those reports and disregarded any additional payments by members of those welfare funds. He also testified that he did not take into account the number of eligibles covered by those fifty-five funds nor the kind and quality of the eye glasses issued for those funds. The testimony of Examiner Zaroff was strongly objected to by Appellants' counsel.

The hearing officer, Respondent and the New York Court of Appeals adopted the $6.19 figure as what eye glasses should have cost Appellant's welfare fund, and they reasoned and found that since Appellants had made contracts that called for a higher average cost of $6.19 per pair, there was a depletion of the welfare fund assets, and Appellants were responsible for this depletion. But for the Findings and Conclusion that $6.19 was what the eye glasses should have cost Appellant's welfare fund based upon the fifty-five other welfare fund reports, the Findings and Conclusion that there was a depletion of the Welfare Fund and the amount of the depletion would have had absolutely no evidenciary basis in the record.

In addition, the hearing officer, Respondent and both the courts below adopted and applied an interpretation that the fifty-five reports were admissable as "presumptive evidence of the facts stated therein" by virtue of Section 37-e(2) of the New York State Insurance Law (53,65) despite the fact that those reports dealt with completely unrelated and unassociated welfare funds, each having its own independent facts, pattern of services available, utilization and cost. Of the fifty-five reports only thirty-four of the welfare funds had written contracts and the balance had oral agreements. Of the fifty-five reports only five dealt with Optometrists like Dr. Zucker rather than with Opticians. Only two of the reports dealt with funds that provided Opthalmological care.

The hearing officer prevented counsel for the trustees from conducting any meaningful examination into the relevance of the fifty-five reports as a standard of comparison measurable against prices paid by the welfare fund. He refused to order the production of the written contracts underlying thirty-four of the fifty-five reports when counsel requested their production and Respondent's attorneys rejected the demand. The hearing officer also refused to allow Appellants' counsel to examine the filed reports on examination of more than 100 other welfare funds which provided optical benefits to determine what services were rendered to those funds and what those funds paid therefor, and to determine if the Department's selection of

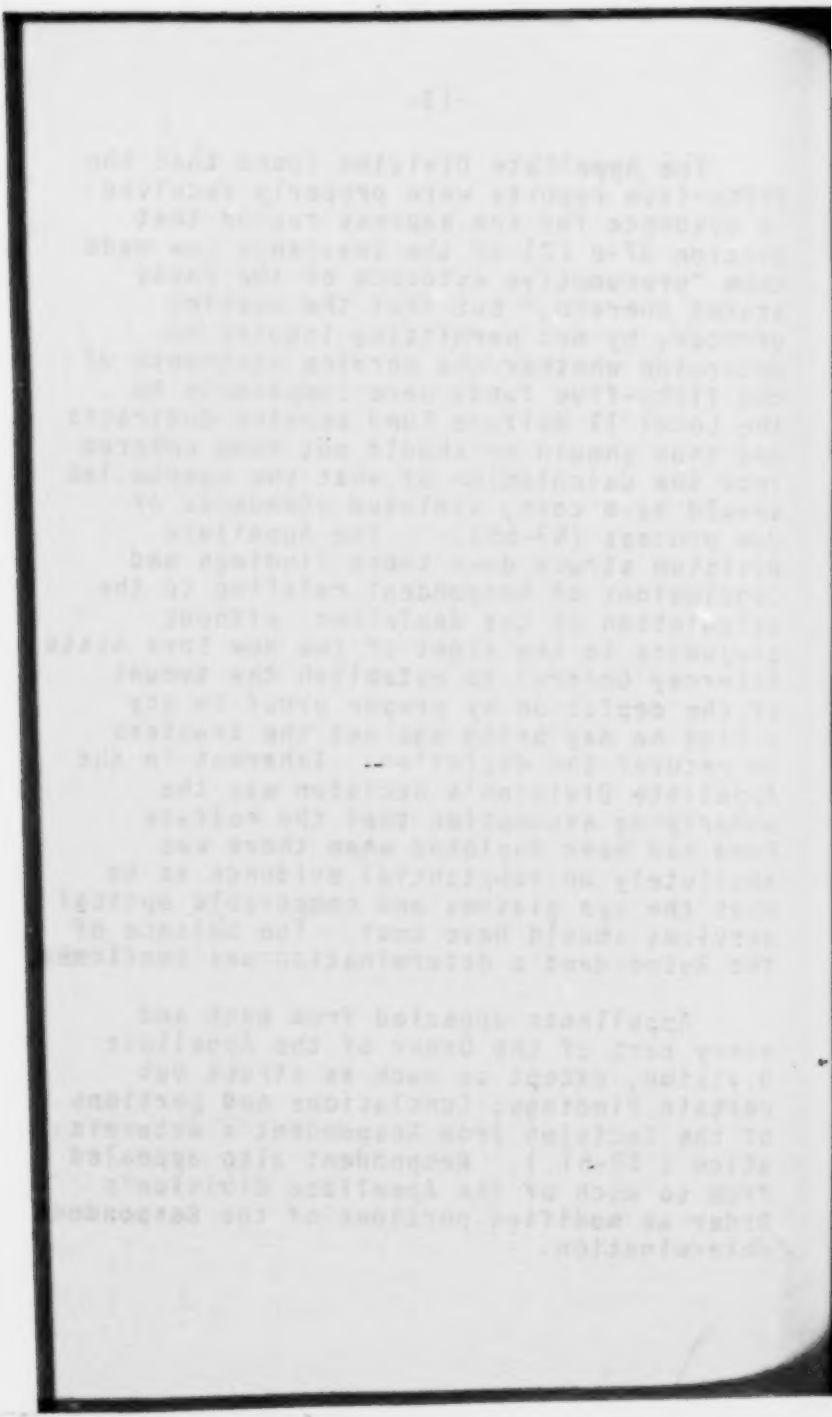
fifty-five reports was actually representative.

The hearing officer refused to direct the Insurance Department to produce for cross examination the Examiners and other Department employees who had signed or prepared the fifty-five reports that had been ruled admissable in evidence. He required instead that they be subpoened from the very agency that would be required by statute to issue the subpoenas. The hearing officer, without inspecting the hundred or more reports of other welfare funds not included in the fifty-five selected by Respondent and allowed in evidence, arbitrarily ruled that they were irrelevant thereby rendering a formal subpoena a futility under Section 23 of the New York Insurance Law (54). The hearing officer further refused to direct the Department to produce various handwritten notes, draft reports and memoranda prepared by the Department investigators and supervisors for use by Appellants' counsel in connection with their cross-examination, ruling that a presumption of credibility attached to the testimony of an Examiner of the New York State Department of Insurance, and that the request was irrelevant.

The Appellate Division found, that based on the hearing officer's attitude as reflected in the record, there was no real possibility of the documents, to which Appellants directed inquiry, being considered by the hearing officer even if produced under subpoena (54).

The Appellate Division found that the fifty-five reports were properly received in evidence for the express reason that Section 37-e (2) of the Insurance Law made them "presumptive evidence of the facts stated therein," but that the hearing officer, by not permitting inquiry to determine whether the service contracts of the fifty-five funds were comparable to the Local 11 Welfare Fund service contracts and thus should or should not have entered into the calculation of what the spectacles should have cost, violated standards of due process (53-55). The Appellate Division struck down those Findings and Conclusions of Respondent relating to the calculation of the depletion, without prejudice to the right of the New York State Attorney General to establish the amount of the depletion by proper proof in any action he may bring against the trustees to recover the depletion. Inherent in the Appellate Division's decision was the underlying assumption that the Welfare Fund had been depleted when there was absolutely no substantial evidence as to what the eye glasses and comparable optical services should have cost. The balance of the Respondent's determination was confirmed.

Appellants appealed from each and every part of the Order of the Appellate Division, except so much as struck out certain Findings, Conclusions and portions of the Decision from Respondent's determination (60-61). Respondent also appealed from so much of the Appellate Division's Order as modified portions of the Respondent's determination.



The New York Court of Appeals modified the Order of the Appellate Division appealed from by reinstating that part of the hearing officer's basic Findings, Conclusions and Decision relating to the proper calculation of the amount of the depletion, which had been struck by the Appellate Division. The New York Court of Appeals found that taking the record as a whole, there was substantial competent evidence to support the entire determination made by the Respondent. It held that the trustees had failed to demonstrate that the administrative proceedings were tainted by any irregularities or a denial of procedural due process (65).

FEDERAL QUESTIONS PROPERLY PRESENTED

Appellants' counsel made timely and proper objection to the admission of the fifty-five Fund Reports and any presumptions that might flow from them. Appellants, in their Petition to Review the Determination of the Respondent (37-47) made to the Appellate Division claimed the Superintendent's Findings, Orders and Decisions were in violation of due process of law, and that necessary witnesses were not produced for cross examination despite demand therefor.

Appellant's counsel consistently objected that they were precluded by the hearing officer from inspecting, examining or introducing into evidence important documents in connection with cross examination of various Insurance Department witnesses. They contended that Section 37-e (2) of the New York State Insurance Law was unconstitutional under the United States Constitution.

The Appellate Division held that "...a muzzle was placed on inquiry to relevance, which is far from basic due process." (54).

Appellant's Notice of Appeal to the Court of Appeals (60-61) was from each and every part of the Order of the Appellate Division, except so much as struck certain Findings, Conclusions and portions of the Decision from Respondent's determination.

The New York Court of Appeals modified the Appellate Division's Order reinstating the hearing officer's basic Findings, Conclusions and Decision concluding "...that the Trustees have failed to demonstrate that the Administrative Proceedings were tainted by any irregularities or a denial of procedural due process." (65).

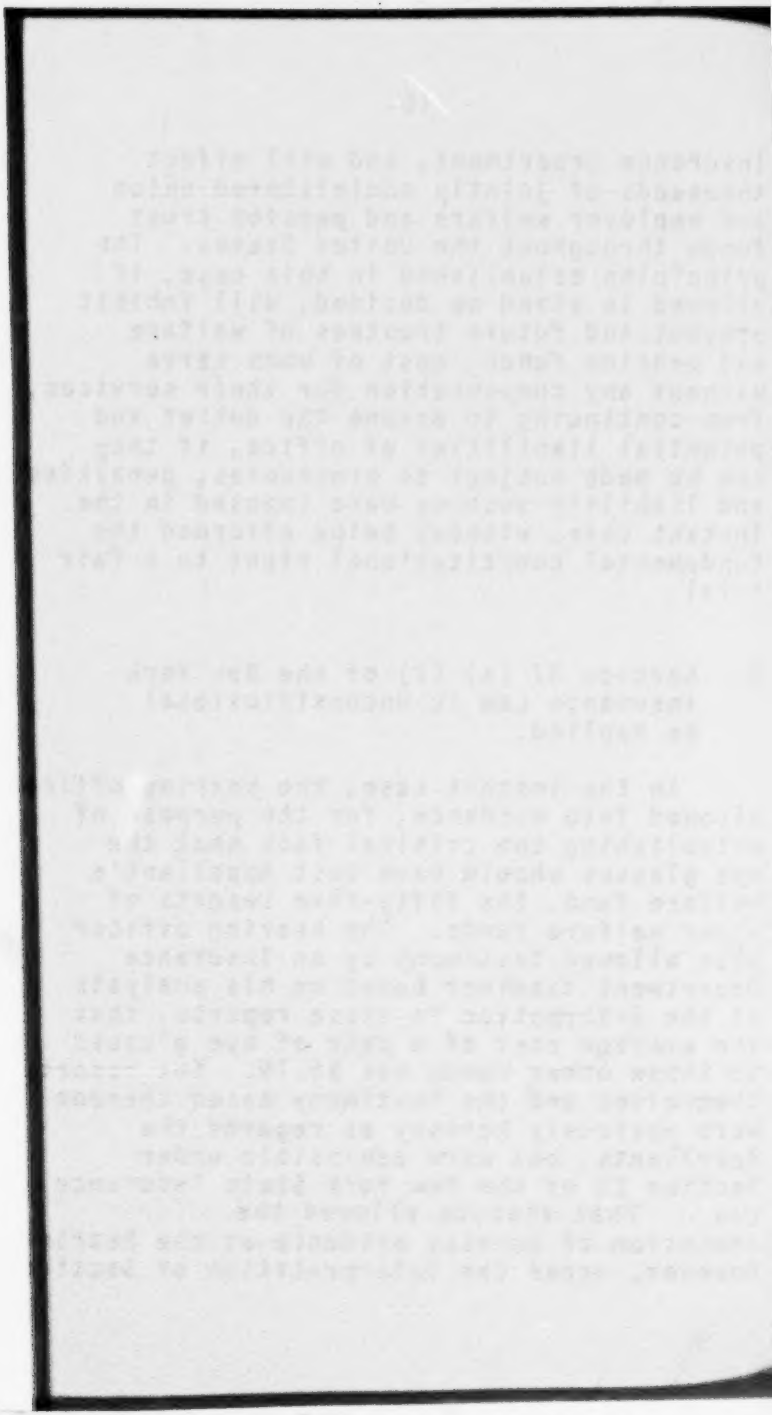
REASONS FOR GRANTING WRIT

Heresay evidence has been used by an administrative tribunal in this case in such a way as to deprive Appellants of their constitutional rights to a fair trial. The procedures and interpretations applied by the hearing officer and approved by the Respondent and the Courts below are likely to have far reaching effects and are not limited to the instant Appellants or the instant case. The constitutional principles of fair trial and due process of law required in an administrative proceeding and denied to Appellants herein, will effect every trustee of every pension and welfare trust fund regulated by the New York State

Insurance Department, and will effect thousands of jointly administered union and employer welfare and pension trust funds throughout the United States. The principles established in this case, if allowed to stand as decided, will inhibit present and future trustees of welfare and pension funds, most of whom serve without any compensation for their services, from continuing to assume the duties and potential liabilities of office, if they can be made subject to procedures, penalties and liability such as were imposed in the instant case, without being afforded the fundamental constitutional right to a fair trial.

A. Section 37 (e) (2) of the New York Insurance Law is Unconstitutional as Applied.

In the instant case, the hearing officer allowed into evidence, for the purpose of establishing the critical fact what the eye glasses should have cost Appellant's welfare fund, the fifty-five reports of other welfare funds. The hearing officer also allowed testimony by an Insurance Department Examiner based on his analysis of the information in those reports, that the average cost of a pair of eye glasses to those other funds was $6.19. The reports themselves and the testimony based thereon were obviously heresay as regards the Appellants, but were admissible under Section 23 of the New York State Insurance Law. That statute allowed the admission of heresay evidence at the hearing. However, under the interpretation of Section



32 (e) (2) of the New York State Insurance Law, applied by Respondent and both reviewing Courts in this case, heresay evidence of facts stated in other welfare fund reports has become elevated to the status of "presumptive evidence" against the Appellants.

The fifty-five reports and the testimony based thereon not only materially influenced the administrative determination, but was wholly responsible for it. It is submitted that such a presumption, when applied in a quasi criminal administrative proceeding, wherein Appellants were charged with the wilful violation of a statute which was a misdemeanor under New York Law (2) violates both the Sixth and Fourteenth Amendments to the United States Constitution. The statutory presumption could only be sustained as constitutional if it was applied against the very welfare fund trustees whose own report had been put in evidence. The interpretation adopted by the New York Courts, which makes the report of any and every welfare fund presumptive evidence against the trustees of every other fund, is clearly erroneous, places an unreasonable and unconstitutional burden upon Appellants, and represents an administrative nightmare to the trustees of all welfare and pension funds regulated by the New York State Insurance Department. The statutory presumption cannot be sustained if there is no rational connection between the fact proved and the ultimate fact presumed, or if the inference from one to the other is arbitrary because of the lack of connection

between the two in common experience. *U.S. v. Romano*, 382 U.S. 136, 139 (1965); *Adler v. Board of Education*, 342 U.S. 485, 497 (1951); *Tot v. United States*, 319 U.S. 463, 467-468 (1943); *People v. Terra*, 303 N.Y. 332, 335 (1951).

The presumption as applied by Respondent and the reviewing Courts is irrational and violative of due process of law.

B. The Administrative Determination was Unsupported by Substantial Evidence and Violated Fourteenth and Sixth Amendment Rights of Appellants.

The administrative finding of $6.19 per pair of eye glasses, based on heresay evidence alone was erroneous and violative of Appellants' constitutional rights.

The New York Court of Appeals has adopted the "substantial evidence rule" and the test thereof enunciated by this Court in *Consolidated Edison Co. v. National Labor Relations Board*, 305 U.S. 197, 229 (1938), which requires "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Matter of Kopec v. Buffalo Brake Beam*, 304 N.Y. 65, 71 (1952); *Matter of Stammer v. Board of Regents*, 287 N.Y. 359, 365 (1942); *Matter of Stork v. Boland*, 282 N.Y. 256, 274 (1940).

"Mere uncorroborated hearsay or rumor does not constitute substantial evidence." *Consolidated Edison Co. v. National Labor Relations Board, supra,* at p. 230.

It has long been held in New York and in the Federal Courts that a determination by an administrative agency without substantial evidence to support it is not in accordance with due process of law. *Capobianco v. U.S.*, 394 Fed. 515, 518 (Ct. Cl. 1949); *Jordan v. American Eagle Fire Ins. Co.*, 169 F. 2d 281, 288 (U.S.C.A., D.C. Cir. 1948); *Sterling Davis Dairy v. Freeman*, 253 F. Supp. 80, 82 (D.C.N.J.); *Matter of Deutch v. Catherwood*, 37 A.D. 2d 399, 401 (First Dept. 1971); *Matter of Cianelli v. Dept. of State*, 16 A.D. 2d 352, 353 (1st Dept. 1962); *Skeels v. Paul Smith's Hotel Co.*, 195 App. Div. 39, 42 (3rd Dept. 1921).

When the substantial evidence test is applied to the instant case, it is apparent that there was no relevant evidence that a reasonable mind might accept to support the conclusion that Appellants' welfare fund should have paid only $6.19 per pair of eye glasses. The only evidence presented at the hearing on this vital question was hearsay consisting of the fifty-five other welfare fund reports submitted by Respondent and the compound hearsay testimony based thereon by Respondent's Examiner. The only analysis the Examiner applied to those reports was the basic charge for lenses contained in those reports. By not attempting to show that the optical services

obtainable under the Local 11 Welfare Fund contracts in question were identical or at least substantially similar to those called for in the fifty-five other welfare funds, a reasonable comparison of average price could not have been drawn. On top of this, the hearing officer further ruled that the Departmental Examiner's testimony was cloaked with a presumption of credibility, a presumption that has no basis in statute or case law in the State of New York.

The Appellate Division properly pointed out that the hearing officer was content with the bald assertion (53, 54) of the Departmental Examiner that the fifty-five funds were the only ones comparable in coverage to the Local 11 Welfare Fund. The Appellate Division further pointed out that the sole basis for a finding of relevance was the Examiner's assurance that those fifty-five reports and no others were relevant.

The Appellate Division decried the fact that counsel for the trustees was prevented from conducting any meaningful examination into the relevance of the fifty-five reports as a standard of comparison measurable against prices paid by the Local 11 Welfare Fund (52-55). The Court concluded, "Thus, a muzzle was placed on inquiry into relevance, which is far from basic due process." (54).

The New York Court of Appeals in its brief opinion did not refer to what evidence it found substantial in the "record as a whole" to support the entire determination made by Respondent (59).

There was no competent or substantial evidence that Appellant trustees overpaid for eye glasses or that the Local 11 Welfare Fund suffered any depletion of its assets for which the Appellants can be held responsible.

When hearsay admitted in an administrative proceeding affects the correctness of the administrative finding, or has a harmful or unfair effect, the hearing should be vitiated. *Klaw v. Schaffer*, 151 F. Supp. 534, 541 (U.S. D.C. So. Dist. N.Y. 1957), aff'd on opn. below, 251 F. 2d 615, judgment vacated, 357 U.S. 346 (1957); *Willapoint Oysters Inc. v. Ewing*, 174 F. 2d 676, 690-691 (U.S.C.A. 9th Cir., 1949), Cert. den'd 338 U.S. 860 (1949); *Farley v. Simmons*, Cert. den'd 305 U.S. 651 (1938) 99 F. 2d 343, 346 (U.S.C.A., D.C. Cir. 1938); *Matter of Erdman v. Ingraham*, 28 A.D. 2d 5 (1st Dept., 1967), motion to dismiss appeal withdrawn, 20 N.Y. 2d 768 (1968).

C. The Hearing Procedures Adopted by Respondent and Sanctioned by the New York Court of Appeals Unconstitutionally Denied Appellants the Right to Cross Examine Witnesses and Other Fundamentals of a Fair Trial.

Appellants were denied the fundamentals of a fair hearing. The constitutional requirements of a fair trial are applicable to administrative hearings. *I.C.C. v. Louisville & Nashville RR*, 227, U.S. 88, 93 (1913); *Powhatan Mining Co. v. Ickes*, 118 F. 2d 105, 109 (C.A. 6th Cir. 1941); *Matter of Erdman v. Ingraham*, 28 A.D. 2d 5, 7 (1967), 20 N.Y. 2d 768 (motion to dismiss appeal withdrawn).

Appellants were denied their Sixth Amendment rights to confront witnesses against them. The right of cross examination in a criminal case has been imposed upon the States by this Court's decision in *Pointer v. Texas*, 380 U.S. 400, 403 (1965), and since Appellants were charged with wilful violation of the statute, a misdemeanor under N.Y. law, they were entitled to cross examine witnesses. The right of cross examination in a civil administrative proceeding has long been recognized under New York law. *Matter of Busking v. Kronimus*, 22 A.D. 2d 888 (2nd Dept. 1964).

Nevertheless the hearing officer denied counsel's requests to produce for examination the investigators who prepared the fifty-five reports.

In *Matter of Erdman v. Ingraham, supra*, the petitioner attacked the determination of the Commissioner of Health of the State of New York on the ground that the material findings of fact of the hearing officer, adopted by the Commissioner were grounded mainly upon hearsay evidence, including the written statements of witnesses who were not produced for cross examination by the Department. Petitioner's counsel took the position that he was not obliged to subpoena witnesses who had given sworn statements to the department's investigator, which statements had been admitted in evidence without their authors being called as witnesses. The Court upheld petitioner's contention and found the admission of the hearsay statement coupled with the Respondent's failure to produce the authors of the statements deprived petitioner of the

opportunity to cross examine and had the effect of depriving him of a fair and proper hearing.

In the *Erdman* case, *ibid*, a section of the New York Public Health Law (Section 10-2) stated:

> "The written reports of state and local health officers...on questions of fact pertaining to... investigations...shall be presumptive evidence, of the facts so stated therein, and shall be received as such in all courts and places." (28 A.D. 2d at 7).

In the *Erdman* case, just as in the instant case, Departmental investigators prepared reports containing the statements of third parties who were not produced at the hearing. Those statements, while admitted by the Court in evidence, were recognized by the Court as mere hearsay evidence (28 A.D. 2d 7), and the Court went on to hold, at 28 A.D. 2d 9:

> "...It is well settled that a fair hearing on the administrative level requires that a party be given the opportunity of cross-examination of witnesses giving material testimony which may be used against him."
>
> * * *
>
> "Although there is other independent and competent evidence, substantial in nature, to support

> some of the charges, it is a reasonable assumption, on the basis of the record, that the hearing officer and the Commissioner were materially influenced in their findings and conclusions by data contained in these third person statements. Under the circumstances, we conclude that the receipt and consideration of the hearsay statements, without the opportunity of cross examination, had the effect of depriving petitioner of the fair and proper hearing to which he was entitled...."

Although Section 23 of the New York Insurance Law guaranteed Appellant the right to cross examine witnesses, the right proved to be a nullity as applied by the hearing officer and reviewing Courts.

Appellants were denied their right to inspect documentary proof against them. This was their right under Section 24 of the Insurance Law.

Appellants were not permitted to examine the reports on examination of the welfare funds that were not selected for use against them by the Insurance Department, nor were they permitted to examine the written contracts that underlay thirty-four of the fifty-five reports introduced in evidence against them by the Insurance Department.

The destruction of their right of inspection deprived them of their constitutional right. *Powhatan Mining v.*

Ickes, supra; Matter of Hecht v. Monaghan, 307 N.Y. 461, 470 (1954).

The failure to afford Appellants due process made a mockery of and completely vitiated the hearing. This is especially so with regard to Trustee Solomon, who was ordered removed from office and fined the statutory maximum as a result of a finding of wilfullness on his part. The entire determination is so basically unjust under all of the circumstances of this case that no part of it should be allowed to stand.

CONCLUSION

FOR ALL OF THE REASONS SET FORTH HEREIN, THIS PETITION FOR WRIT OF CERTIORARI SHOULD BE GRANTED.

Respectfully submitted,

IRA DROGIN
275 Madison Avenue
New York, New York 10016
Attorney for Petitioners

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Statement, Findings of Fact,
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State of New York
INSURANCE DEPARTMENT
123 William Street
New York 10038

Richard E. Stewart
Superintendent of Insurance

In the Matter

of

HARRY GREENSEID, ERNEST GUGGENHEIM, SAM WEISS, JOHN R. MURPHY, LOUIS KLEIN, BENJAMIN WALLACK, AUSTIN B. COX, LESTER KLEPPER, JOHN LEONIDAS, BERNARD HELFER, ARTHUR RUSSELL, GEORGE PAPALEXIS, ELMER HAUCK, WILLIAM DONOVAN, AND MURRAY SOLOMON, AS TRUSTEES OF LOCAL NO. 11 WELFARE TRUST FUND

The above entitled matter having come on for hearing on April 24, 1967, May 8, 1967, May 25, 1967, May 26, 1967 May 29, 1967, June 21, 1967, June 26, 1967, June 28, 1967, November 3, 1967 November 9, 1967, November 10, 1967, November 16, 1967, and December 7, 1967 at the Office of the Superintendent of Insurance, 123 William Street, New York, New York, to show cause

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why the Respondents should not be removed as Trustees of Local No.11 Welfare Trust Fund and/or why the Respondents should not be charged with a depletion of fund assets in the total amount of $156,564.72 and/or why a penalty not to exceed $2,500.00 should not be imposed against the Respondents on the grounds that the Respondents wilfully failed to comply with the requirements of Section 37-1(1) of the Insurance Law; said proceedings having been commenced by the service of a citation dated September 12, 1966, upon the Respondents in accordance with Sections 22, 23, 37-1(5) and 37-1(6) of the Insurance Law; the Respondents Harry Greenseid, Ernest Guggenheim, Sam Weiss, John R. Murphy, Louis Klein, Arthur Russell, George Papalexis, Elmer Hauck, William Donovan, Murray Solomon, and John Leonidas having appeared by Harold L. Luxemburg, Esq.; the Respondents Austin B. Cox and Lester Klepper having appeared by Poletti Freidin Prashker Feldman & Gartner, Esqs., Murray Gartner, Esq., of counsel, the Respondent Sam Weiss having also appeared by Harry Davis, Esq.; the Respondents Bernard Helfer and Benjamin Wallack having appeared by Leonard Goldberg, Esq.; and the Department having appeared and moved at the hearing to amend the citation upon which motion, decision was reserved and the Respondents having moved, at the hearing, for a dismissal of the citation upon which motions, decisions were reserved and after having heard the proof presented herein, and the matter having been fully submitted

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and due deliberation having been had, the following statement, findings of fact, decision and conclusions are made:

STATEMENT

These proceedings were instituted pursuant to the provisions of Article 111-A of the Insurance Law, the Welfare Fund Act. This Act had its inception in the abuses that formerly permeated the field of welfare funds.

As stated by the Superintendent of Insurance in his 1954 report to the Governor entitled "Whose Welfare?", which report was the basis of the enactment by the New York legislature in 1956 of Article 111-A of the Insurance Law:

> ". . .Unsecured and seldom repaid loans, and outright subsidies have been made for purposes at variance with the aims of welfare funds, such as strike benefits, and expenses of union and fund officials for vacations and country club memberships. . . "
>
> ". . .Not only has nepotism been evident, but sinecures have been provided for relatives of union and fund officials Benefit provisions have frequently discriminated in favor of the union and welfare plan, furnishing such officials with benefits far exceeding those grant-

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ed the rank and file. If the trustees of these plans had properly exercised their fiduciary and managerial duties, many of these abuses could have been avoided, and the exploitation of welfare funds, by unscrupulous individuals, prevented. . ."

Under Article 111-A of the New York State Insurance Law, pertaining to "Employee Welfare Funds" it is expressed policy of the State of New York "that Employee Welfare Funds are of great benefit to employees and their families and that their growth should be encouraged; that the establishment and management of such funds vitally affect the well-being of millions of people and are in the public interest; and that such funds should be supervised by the State to the extent necessary to protect the rights of employees and their families. . ." Insurance Law Sec. 37

The term "Employees Welfare Fund" means a "trust fund or other fund established or maintained jointly by one or more employers together with one or more labor organizations, whether directly or through trustees. . ." Insurance Law Sec. 37-a(1) The term "trustee" means "the person or group who or which is charged with or has the general power of administration over an employee welfare fund and may include. . . a board of individual trustees. . ." Insurance Law Sec. 37-a(3)

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The trustees of every employee welfare fund are responsible in a fiduciary capacity for all money, property, or other assets received, managed or disbursed by them, or under their authority, on behalf of such fund. Insurance Law Sec. 37-1(1). Consequently, employee welfare funds are trust funds subject to all the safeguards which the law surrounds funds belonging to others in the hands of fiduciaries.

The Trustees of every employee welfare fund are required to register such fund with the Superintendent of Insurance of the State of New York. Insurance Law Sec. 37-b(1). The Superintendent of Insurance may examine into the affairs of any employee welfare fund as often as he deems it necessary. Insurance Law Sec. 37-c(1). The trustees of every employee welfare fund are responsible for the maintenance of accurate records of its books and accounts. insurance Law Sec. 37-c(2). Whenever the Superintendent of Insurance shall determine to examine the affairs of any employee welfare fund he shall make an order indicating the scope of the examination, and may appoint examiners. Insurance Law Sec. 37-d(1). All reports of examination and investigation are confidential communications and may not be made public unless ordered by the Superintendent in which event he may publish a copy of any such report or

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any part thereof in such manner as he may deem proper. Insurance Law Sec. 37-e(1). Such report, if published by the Superintendent of insurance, is admissible in evidence in any proceeding against the Trustees of any employee welfare fund, and is presumptive evidence of the facts stated therein. Insurance Law Sec. 37-e(2).

If after notice and a hearing the Superintendent of Insurance finds that the Trustees have wilfully failed to comply with the requirements of Article 111-A of the Insurance Law, he may impose a penalty or remove the Trustees from office or both. Insurance Law Sec. 37-1(5). If after notice and a hearing the Superintendent finds that any employee welfare fund has been depleted by reason of any wrongful or negligent act of omission of a Trustee, he may transmit a copy of his findings to the Attorney general who may bring an action for the recovery of such depleted funds. Insurance Law Sec. 37-1(6).

FINDINGS OF FACT

1. The notice of hearing was served upon the respondents on September 15, 1966 in accordance with the provisions of Sections 22, 23, 37-1(6) of the Insurance Law.

2. The Respondents, Harry Greenseid, Ernest Guggenheim, Arthur Russell, William Donovan, Murray Solomon and John Leonidas served as Trustees of Local No. 11 Welfare Trust Fund during the period commencing

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January 1, 1960 and terminating December 31, 1965. The Respondent, Murray Solomon, was and is the administrator and is presently a Trustee thereof.

3. The Respondent, Sam Weiss, served as a Trustee of Local 11 Welfare Trust fund during the period commencing January 1, 1960 and terminating November 25, 1960.

4. The Respondent, John R. Murphy, served as a Trustee of Local No. 11 Welfare Trust Fund during the period commencing January 1, 1960 and terminating February 27, 1963.

5. The Respondent, Louis Klein, served as a Trustee of Local No. 11 Welfare Trust Fund during the period commencing January 1, 1960 and terminating June 1, 1964.

6. The respondent, Benjamin Wallack, served as a Trustee of Local No. 11 Welfare Trust Fund during the period commencing May 20, 1963 and terminating March 4, 1966.

7. The Respondent, Austin B. Cox, served as a Trustee of Local No. 11 Welfare Trust Fund during the period commencing January 1, 1960 and terminating July 1, 1963 and during the period commencing June 29, 1965 and terminating December 31, 1965.

8. The respondent, Bernard Helfer, was designated as a Trustee of Local No. 11 Welfare Trust Fund on April 1, 1966.

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9. The Respondent, Lester Klepper, served as a Trustee of Local No. 11 Welfare Trust Fund during the period commencing May 15, 1964 and terminating April 12, 1965.

10. The Respondent, George Papalexis served as a Trustee of Local No. 11 Welfare Trust Fund during the period commencing January 1, 1960 and terminating May 18, 1964.

11. The Respondent, Elmer Hauck, served as a Trustee of Local No. 11 Welfare Trust Fund during the period commencing January 1, 1960 and terminating May 14, 1964.

12. The Respondent, Louis Klein, died on December 10, 1966 and that this proceeding was dismissed against said Respondent upon motion of Harold Luxemberg, Esq., counsel for said Respondent.

13. Local No. 11 Welfare Trust Fund is an "employee welfare fund" as defined in Section 37-a(1) of the Insurance Law

14. The Respondents herein are "Trustees" as defined in section 37-a(3) of the Insurance Law.

15. On February 18, 1963, the Hon. Thomas Thacher, then Superintendent of Insurance of the State of New York, in compliance with the provisions of Section 37-d of the Insurance Law, issued a written order to Jacob E. Bukzin appointing him to examine into the affairs of Local No. 11

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Welfare Trust Fund of 236 West 40th Street New York, New York, setting forth the scope of said examination, to wit; to make a full report in writing containing such information as he shall deem requisite and to furnish a complete statement of its affairs and the manner of conducting its business.

16. The said Jacob E. Bukzin did, pursuant to order, examine into the affairs of Local No. 11 Welfare Trust Fund and, pursuant to Section 37-d(2) of the Insurance Law rendered a report in writing to the Superintendent of Insurance dated July 30, 1964.

17. The said report on Examination comprising Department's Exhibit 9, was duly authorized on December 14, 1966 to be published by the Superintendent of Insurance of the State of New York pursuant to Section 37-e(1) of the Insurance Law and that such publication was made by the Insurance Department.

18. The 55 reports on Examination comprising Department's Exhibit 17 to 17BBB were duly authorized to be published on December 14, 1966 by the Superintendent of Insurance of the State of New York pursuant to Section 37-e(1) of the Insurance Law and that such publication was made by the Insurance Department.

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19. The report on Investigation of examiner, Murray Zaroff, dated April 21, 1967 comprising Department's exhibit 22, was duly authorized to be published April 21, 1967 by the Superintendent of Insurance of the State of New York pursuant to Section 37-e (1) of the Insurance Law and that such publication was made by the Insurance Department.

20. On January 15, 1960, Local No. 11 Welfare Trust Fund, acting through the Trustees then in office, entered into an agreement with one, Morris Zucker, an optometrist, to render certain optical services to Local No. 11 Welfare Trust Fund eligibles which included certain designated dependents. Such services were to be paid for by the said Welfare Fund at the rate of $.17 per member per month. The said agreement provided that it was to terminate on December 31, 1960 but was to be renewed for annual periods thereafter unless either party gave at least 10 days notice prior to December 31 of each year of an intention to terminate.

21. On May 1, 1960, Local No. 11 Welfare Trust Fund, acting through the Trustees then in office, entered into an agreement with the said Morris Zucker to render similar services, to be paid for by the said Welfare Fund at the rate of $6.00 per member per annum. Said agreement, by its terms, cancelled and superseded all other agreements between the parties. The

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said agreement provided that it was to terminate on April 30, 1962 but was to be renewed for annual periods thereafter unless either party gave at least 30 days notice prior to April 30 of each year of an intention to terminate.

22. On August 1, 1962, Local No. 11 Welfare Trust Fund, acting through the Trustees then in office, entered into an agreement with the said Morris Zucker to render similar services, to be paid for by the said Welfare Fund at the rate of $33,000.00 per annum. The said agreement provided that it was to terminate on July 31, 1963 but was to be renewed for annual periods thereafter unless either party gave at least 10 days notice prior to any annual termination date of an intention to terminate.

23. All three agreements as aforesaid, remained in effect, successively, during the period commencing January 1, 1960 and terminating December 31, 1965.

24. The Local No. 11 Welfare Trust Fund paid to Zucker, pursuant to the aforesaid contracts, the sums of money listed in each of the following years:

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1960	$21,165.00
1961	29,305.00
1962	31,310.00
1963	33,000.00
1964	33,000.00
1965	33,000.00

25. Although cards authorizing fund eligibles to use Zucker's services were issued by Local No. 11 Welfare Trust Fund no records as to the actual utilization of Zucker's services by fund eligibles under the aforesaid contracts were kept or maintained by Local No. 11 Welfare Trust Fund.

26. Morris Zucker's records indicate that he was visited each year, by the following number of Local No. 11 Welfare Trust Fund eligibles:

1960	787
1961	718
1962	683
1963	653
1964	881
1965	770
TOTAL	4492

The records of Local No. 11 Welfare Trust Fund indicate that authorization cards for the use of Zucker's services were issued each year, to the Welfare

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Fund eligibles as follows:

1960	1233
1961	1092
1962	1292
1963	1207
1964	1114
1965	952
TOTAL	6890

27. The average cost per pair of classes based upon the prices paid, as reported in the reports on examination of 55 welfare funds, comprising Department's Exhibit 17 to 17BBB, for substantially similar services rendered, is found to be $6.19.

28. On the basis of the authorization cards issued by Local No. 11 Welfare Trust Fund as indicated by the records of the said Fund, even assuming maximum utilization of Zucker's services and postulating that a pair of glasses was issued for each utilization card, an assumption that has not even been urged by Respondents, the assets of said fund were wrongfully and negligently depleted during the years 1960 through 1965 inclusive, in the total sum of $138,130.90 as indicated in Schedule 2, attached hereto.

29. The assets of the Local No. 11 Welfare Trust Fund have been depleted as aforesaid, by reason of the wrongful and

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negligent acts and omissions on the part of the Respondents found to be responsible, in that they agreed to and did in fact pay excessive and exhorbitant sums of money to Zucker for his services and that they failed, during their respective terms of office, as trustees, to keep adequate records relating to the utilization of Zucker's services by fund eligibles. Consequently, even if respondents had the inclination to do so, they were unable to determine and in fact did not determine, at any time during the years 1960 to 1965, inclusive, whether the Welfare Fund had received or was receiving reasonable value for the funds expended.

30. The assets of the Local No. 11 Welfare Trust Fund have been depleted, as aforesaid, as the result of the wrongful and negligent acts and omissions on the part of the responsible Respondents in that they did not, during their respective terms of office as Trustees, exercise the right of the Local No. 11 Welfare Trust Fund to cancel any or all of the respective contracts with Zucker by giving the notice provided for therein.

31. Respondent, Bernard Helfer, became a Trustee after the dated for which a depletion of fund assets is charged.

32. Respondent Lester Klepper is not chargeable with the wrongful and negligent acts and omissions attributed to the

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Respondents generally, in that he became a Trustee after the contracts were entered into with Zucker and his service was for so short a period of time as to have rendered it difficult, if at all possible for him to determine the reasonableness of the expediture by the Welfare Fund, during his term as a Trustee, for the optical benefit supplied by Zucker.

33. That each of the Respondents, except Bernard Helfer and Lester Klepper are jointly and sverally responsible for the depletion of the assets of Local No. 11 Welfare Trust Fund in various amounts, depending on their terms as trustees, and as hereinafter set forth.

34. I find that Respondents, Greenseid, Guggenheim, Leonidas, Russell, Donovan, Weiss, Murphy, Wallack, Cox, Papalexis, and Hauck breached their fudiciary responsibility under the statute and that such breach was the result of wrongful and negligent acts and omissions.

35. The Respondent, Solomon, breached his fudiciary responsibilities, under the statute, and such breach was the result not only of wrongful and negligent acts and omissions but also constituted a wilful failure to comply with the requirements of Article III-A of the Insurance Law, in that as administrator of the Local No. 11 Welfare Trust Fund responsible for running the affairs of said fund he was responsible

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for and participated personally in the agreements which were entered into with Zucker and furthermore, he was advised personally by the Department in 1963 or early in 1964 of the necessity of making utilization studies and that he permitted seven months to elapse before obtaining utilization data from Zucker, and that even after receipt of the data, such as it was, he failed to act.

DECISION

From the evidence presented, both testimonail and documentary, at a lengthy hearing, the transcript of which consists of 1018 pages, it is clear that excessive and exhorbitant sums were paid to one Morris Zucker, an optometrist, pursuant to three contracts during the years 1960 through 1965 inclusive. The facts indicate that Zucker, pursuant to said contracts, received $21,165.00 from the fund during 1960; the sum of $29,305.00 in 1961; the sum of $31,310.00 in 1962 and that in 1963, 1964 and 1965, Zucker received a flat sum of $33,000.00 during each of those years. Such payments to zucker over the years are reasonable or unreasonable only in relation to the number of fund eligibles who availed themselves of Zucker's services.

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If the payments to Morris Zucker were unreasonable, and thus depleted the welfare fund, the trustees responsible for such depletion are liable for the funds unreasonably spent if due to any wrongful or negligent act or omission on their part. Insurance Law Sec. 37-1(1), (6); In Re Manheim etal 53 NYS-2nd 258; in Re Winnie's Estate, 273 NYS 806.

It should be noted that the contracts between Zucker and Local No. 11 Welfare Trust Fund contained no provision for retrospective adjustment based upon actual utilization. The Department has ruled that such agreements constitute the doing of an insurance business without a license and violate Section 41 of the Insurance Law. However, this issue was not raised at the hearing and accordingly no determination of such violation is made at this time.

The records of Zucker himself, indicate that 787 visits were made by Local No. 11 Welfare Trust Fund eligibles in 1960; 718 in 1961; 683 in 1962; 653 in 1963; 881 in 1964; and 770 in 1965, for a total of 4,492 visits over the 6 year period. Dividing the number of visits each year into the amount of money paid to Zucker each year, Zucker received an average of $26.89 for each visit in 1960; $40.81 in 1961; $45.84 in 1962; $50.54 in 1963; $37.46 in 1964; and $42.86 in 1965.

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It is the contention of the Department, with which I agree, that even assuming every visit to Zucker in each of these years resulted in the issuance of one pair of eyeglasses, the total amount paid to Zucker, based on the charge calculated for each pair of glasses, was patently excessive. What then was a reasonable charge for the services rendered which makes the amount actually charged, excessive?

The Welfare Fund Bureau of the New York State Insurance Department has been examining welfare funds since the inception of the Welfare Fund Act in 1956, many of which provided services substantially similar to those rendered by Zucker. In fact, the Department presented in evidence the Reports on Examination of 55 Welfare Funds conducted as of the time Zucker was rendering services to the Local No. 11 welfare Trust Fund as charged in the citation herein. These 55 Reports indicate that substantially similar services, as those rendered by Zucker, cost these welfare funds an average of $6.19 per pair of eyeglasses.

While the respondents argue that the contracts with Zucker provide for services in addition to the services rendered as reported in Department's Exhibit "17-17BBB", to wit; consultation with an ophthalmologist and audiometric tests, nevertheless they fail

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ed to offer any evidence to indicate that any of the Local No. 11 Welfare Trust Fund eligibles ever availed themselves of these additional services. The failure of Respondents to even attempt to show that these "additional" services were ever utilized, speaks for itself and requires no further comment.

Thus, on the basis of an average cost of $6.19 per pair of glasses and the records of Zucker indicating the number of visits to him during each year, the amount of overcharge per year was as follows*:

Year	Depletion
1960	$ 16,293.47
1961	24,860.58
1962	27,082.23
1963	28,957.93
1964	27,546.61
1965	28,233.70
TOTAL	$152,974.52

*For detailed analysis of the computation see Schedule 1 attached hereto.

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On the other hand, documentary evidence was presented on behalf of those respondents represented by Harold L. Luxemburg, Esq. indicating that authorization cards for Zucker's services were issued to fund eligibles during the aforementioned years as follows:

Year	Number of Cards Issued
1960	1,233
1961	1,092
1962	1,292
1963	1,207
1964	1,114
1965	952
TOTAL	6,890

Even if we assumed that every person who received an authorization card according to the records of Local No. 11 Welfare Trust Fund, availed themselves of Zucker's services and received a pair of glasses, an assumption which has no basis in the record as no evidence whatsoever was offered by Respondents in this regard, the average cost per pair of glasses for the years 1960 to 1965 inclusive, was as follows:

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Year	Cost per pair of glasses
1960	$17.16
1961	26.91
1962	24.23
1963	27.34
1964	29.62
1965	34.70

On the basis of the foregoing assumption which gives Respondents maximum credit for the fund eligibles' utilization of Zucker's services based upon the number of authorization cards issued and based upon the average cost of glasses of 55 other funds, that is, $6.19 per pair, the amount of overcharge during the years of 1960 to 1965 exclusive, is as follows:

Year	Depletion
1960	$ 13,532.73
1961	22,545.52
1962	23,312.52
1963	25,528.67
1964	26,104.34
1965	27,107.12
TOTAL	$138,130.90

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The respondents represented by Harold L. Luxemburg, Esq. presented oral testimony that other individuals obtained authorization by telephone to avail themselves of Zucker's services and that said authorizations allegedly were not recorded on the fund records and thus are not included in the number of 6,890 as aforesaid. In view of the great lengths to which the Welfare Fund apparently went to maintain a record of the authorization cards issued as indicated in Respondents' Exhibit "w", (as opposed to actual utilization records) it is difficult to believe that a complete record would not have been made at the welfare fund office of a person telephoning to receive authorization to visit Zucker. Any doubts raised by the failure of the respondents to keep adequate records must be resolved against them. As stated in the case of White v. Rankin, 18 App. Div. 293, 4NYS228, affirmed 162 NY 622:

> "...The general rule of law applicable to a trustee burdens him with the duty of showing that the account which he renders and the expeditures which he claims to have made were correct, just and necessary. Marvin v. Brooks, 94 NY 71. <u>He is bound to keep clear and accurate accounts, and, if he does not, the presumptions are all against him;</u>

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obscurities and doubts being resolved adversely to him. 2 Perry, Trusts, Sec. 821".

In fact, the Department presented records through its Exhibit "18" of all of the visits made to Zucker and such visits amounted to a total of 4,492.

I am prepared, however, to grant the respondents the widest latitude in determining the number of visits to Zucker, and accepting the respondent's figures as set forth in respondent's Exhibit W, it is apparent, even assuming that each card represented the dispensing by Zucker of a pair of glasses, that the Welfare Fund was depleted over the years 1960 to 1965 in the sum of $138,130.90*.

However, not all the Trustees named in the Citation herein are responsible for this depletion, nor are the responsible Trustees liable for the same proportion for the said depletion.

Respondent, Lester Klepper, because he served as a Trustee after the signing of the 3rd and final contract with Zucker

*For detailed analysis of the computation see Schedule 2 attached hereto.

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and because of the short time he served thereafter is hereby exonerated from all charges in the Citation.

Respondent, Bernard Helfer, is also exonerated, in view of the fact that his services, as trustee, began after the period covered in the Citation.

Respondents, Harry Greenseid, Ernest Guggenheim, John Leonidas, Arthur Russell, William Donovan and Murray Solomon are wholly responsible jointly and severally for the depletion in the amount of $138,130.90, in view of the fact that they served as Trustees during the entire period charged in the citation herein.

Respondents, Sam Weiss, John R. Murphy, Benjamin Wallack, Austin B. Cox, George Papalexis and Elmer Hauck having served only during a part of the period charged in the citation herein are jointly and severally responsible, together with those respondents found wholly responsible, only for a portion of the said depletion for the periods set forth below after their respective names:

Sam Weiss	11/12 of 1960
John R. Murphy	1960-1961-1962 and 2/12 of 1963
Benjamin Wallack	7/12 of 1963, 1964 and 1965

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Austin B. Cox	1960, 1961, 1962, 1/2 of 1963 and 1/2 of 1965
George Papalexis	1960, 1961, 1962, 1963 and 4/12 of 1964
Elmer Hauck	1960, 1961, 1962, 1963 and 4/12 of 1964

In conclusion I find that the Welfare Fund has been depleted by the responsible Respondents by reason of wrongful and negligent acts and omissions on their part in that, during their respective terms of office, as trustees, they paid excessive sums to Zucker for services rendered by him to Local No. 11 Welfare Trust Fund eligibles; they failed to keep adequate records relating to the utilization of Zucker's services by fund eligibles; they did not determine, at any time during the years 1960 and 1965, inclusive, whether the welfare fund had received or was receiving reasonable value for the funds expended and they did not exercise the right of the welfare fund to cancel any or all of the respective contracts with Zucker by giving the notice provided for therein.

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As respects the Respondent Solomon, in addition to his wrongful and negligent acts and omissions in his capacity as a Trustee of Local No. 11 Welfare Trust Fund he was employed by the fund as the administrator of the fund during the entire period covered by the citation, and during the period in which the contracts with Zucker were executed. As such he was a personal party to the transactions which constitute the basis of the citation herein and his knowledge of and participation in such transactions constituted a wilful failure to comply with the requirements of Article III-A of the Insurance Law.

I find that each of the respondents, except Louis Klein, Bernard Helfer and Lester Klepper, against whom the charges are dismissed are jointly and severally responsible for the depletion of the assets of Local No. 11 Welfare Trust Fund in the amounts hereinafter set forth.

CONCLUSIONS

I. All motions made by the Respondents herein to dismiss the citation, except the motion made on behalf of the Respondent, Lester Klepper, be and the same are hereby denied.

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The motion made on behalf of the Respondent, Lester Klepper for a dismissal of the citation herein, as to the said Respondent, be and the same is hereby granted.

The motion made by the Department to amend the citation herein, be and the same is hereby granted.

All charges and specifications contained in the citation dated September 12, 1966, as amended, against the Respondents Bernard helfer, Lester Klepper and Louis Klein are hereby dismissed.

II. Pursuant to the provisions of Sec. 37-1(6) of the Insurance Law I:

FIND that the assets of Local No. 11 Welfare Trust Fund have been depleted in the sum of $138,130.90 by reason of the wrongful and negligent acts and omissions of the Respondents named below, and I further

FIND that as the result of the wrongful and negligent acts and omissions of the Respondents named below, said Respondents are jointly and severally responsible for the depletion of the assets of Local No. 11 Welfare Trust Fund in sums not to exceed the amounts set forth after their respective names:

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Harry Greenseid	$138,130.90
Ernest Guggeheim	138,130.90
John Leonidas	138,130.90
Arthur Russell	138,130.90
William Donovan	138,130.90
Murray Solomon	138,130.90
Sam Weiss	12,405.00
John R. Murphy	61,644.65
Benjamin Wallack	68,103.18
Austin B. Cox	85,696.67
George Papalexis	93,620.88
Elmer Hauck	93,620.88

III. Pursuant to the provisions of Section 37-1(5) of the Insurance Law it is

ORDERED that the Respondent, Murray Solomon, be and he hereby is removed as a Trustee of Local No. 11 Welfare Trust Fund, and it is further

ORDERED that the Respondent, Murray Solomon be and he hereby is fined the sum of $2,500.00 and it is further

ORDERED that the Respondent, Murray Solomon, be and he hereby is removed as the administrator of Local No. 11 Welfare Trust Fund, and it is further

ORDERED that a copy of this determination be serviced by Certified Mail, upon each Respondent, at his last known address, and upon their respective attorneys.

A copy of this determination and findings shall be transmitted to the

APPENDIX 1

Statement, Findings of Fact Decision and Conclusions

Attorney General of the State of New York, pursuant to the provisions of Section 37-1 (6) of the Insurance Law, for such action as be deems necessary and proper.

Dated: New York, New York
April 3, 1968

S/Albert J. Millus
ALBERT J. MILLUS
Deputy Superintendent
of Insurance

I, Richard E. Stewart, Superintendent of Insurance, pursuant to authority vested in me under the New York Insurance Law, do hereby approve and adopt the determination hereinabove made. I find that the ends of justice and the public advantage will be subserved by the publication of the above determination and by the publication of the Report of Examination of Local No. 11 Welfare Trust Fund dated July 30, 1964 not only in connection with the above proceedings but for all purposes and consequently I do hereby order the publication thereof by making same available for public inspection at the office of the Welfare Fund Bureau, 55 John Street, New York, New York.

Dated: New York, New York
April 5, 1968

S/Richard E. Stewart
RICHARD E. STEWART
Superintendent of Insurance

Statement, Findings of Fact,
Decision and Conclusions

SCHEDULE 1

Analysis of Costs each year
based upon Dr. Zucker's records
(Department's Exhibit 18)

Year	No. of visits*	Amount paid to Dr. Zucker	Cost per pair of glasses	Value at $6.19 per pair	Depletion
1960	787	$ 21,165.00	$ 26.89	$ 4,871.53	$ 16,293.47
1961	718	29,305.00	40.81	4,444.42	24,860.58
1962	683	31,310.00	45.84	4,227.77	27,082.23
1963	653	33,000.00	50.54	4,042.07	28,957.93
1964	881	33,000.00	37.46	5,453.39	27,546.61
1965	770	33,000.00	42.86	4,766.30	28,233.70
	4,492	$180,780.00		$27,805.48	$152,974.52

* Each visit considered as the issuance of one pair of glasses.

SCHEDULE 2

Analysis of Costs each year
based upon assumed Utilization
set forth in respondents' Exhibit "W"

Year	Number of cards Issued	Amount paid to Dr. Zucker	Cost per pair of glasses	Value at $6.19 per pair	Depleteion
1960	1233	$ 21,165.00	$17.16	$ 7,632.27	$ 13,532.73
1961	1092	29,305.00	26.91	6,759.48	22,545.52
1962	1292	31,310.00	24.23	7,997.48	23,312.52
1963	1207	33,000.00	27.34	7,471.33	25,528.67
1964	1114	33,000.00	29.62	6,895.66	26,104.34
1965	952	33,000.00	34.70	5,892.88	27,107.12
	6890	$180,780.00		$42,649.10	$138,130.90

APPENDIX 1

Statement, Findings of Fact, Decision and Conclusions

State of New York)
County of New York) SS.:

The undersigned attorney hereby certifies that the foregoing Statement, Findings of Fact, Decision and Conclusions has been compared by him with the original and found to be a true and complete copy.

S/Stanley W. Berman
Stanley W. Berman
Assistant Counsel
Welfare Fund Bureau

Dated: New York, N. Y.
April 5, 1968

APPENDIX 2

Petition to Review the Determination of the Superintendent of Insurance

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

In the Matter of the Application

of

HARRY GREENSEID, GEORGE PAPALEXIS, ELMER HAUCK, JOHN LEONIDAS, ARTHUR RUSSELL, WILLIAM DONOVAN, and MURRAY SOLOMON, individually and as Trustees of Local 11 Welfare Trust Fund,

Petitioners,

-against-

RICHARD E. STEWART, SUPERINTENDENT OF INSURANCE OF THE STATE OF NEW YORK,

Respondent.

Pursuant to Article 78 of the Civil Practice Law and Rules

TO THE SUPREME COURT OF THE STATE OF NEW YORK:

The petition of HARRY GREENSEID, GEORGE PAPALEXIS, ELMER HAUCK, JOHN LEONIDAS, ARTHUR RUSSELL, WILLIAM DONOVAN and MURRAY SOLOMON, individually and as Trustees of Local 11 Welfare Trust Fund (hereinafter the "Petitioners") respectfully shows that:

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Petition to Review the Determination of the Superintendent of Insurance

FIRST: At the times set forth in the citation herein Petitioners were Trustees of Local 11 Welfare Trust Fund (hereinafter the "Fund"), an employee welfare fund duly organized and existing under Article 3-A of the Insurance Law of the State of New York, with its principal offices at 236 West 40th Street, New York, New York.

SECOND: The Superintendent of Insurance of the State of New York (hereinafter the "Respondent"), or his predecessor, at all times hereinafter mentioned was the head of the Insurance Department of the State of New York (hereinafter the "Department"), charged and invested with the rights, powers and duties conferred upon him by the Insurance Law of the State of New York.

THIRD: On or about September 15, 1966, the Department issued and served a Citation requiring the Petitioners, and other Trustees of the Fund, to appear at a hearing at the Department to show cause why they should not be removed as Trustees of the Fund, why they should not be charged with depletion of Fund assets and why a penalty not to exceed $2,500 should not be imposed upon them on the alleged grounds that Petitioners willfully failed to comply with the requirements of Section 37-1.1 of the Insurance Law. In general, Petitioners, and other Trustees of the Fund, were charged with having breached their fudiciary responsibilities by having made to a certain optometrist, one Dr. Morris Zucker, excessive

APPENDIX 2

Petition to Review the Determination of the Superintendent of Insurance

payments for services rendered by him to the Fund's members and dependents during the period 1960-1965, inclusive, which charge was further predicated upon the allegation that during this period the Fund paid to Dr. Zucker, for eyeglasses issued by him, sums of money substantially in excess of $6.19 per pair, the alleged "average" of the cost of eyeglasses paid by certain other welfare funds. (The Citation is annexed hereto and made a part hereof as Exhibit "A").

FOURTH: On or about December 9, 1966, the Petitioners served and filed with the Department an Answer to the Citation and the charges therein. (Said Answer is annexed hereto and made a part hereof as Exhibit "B").

FIFTH: Pursuant to said Citation, a hereaing was held by the Department on April 24, 1967, May 8, 1967, May 25, 1967, May 29, 1967, June 21, 1967, June 26, 1967, June 28, 1967, November 3, 1967, November 9, 1967 November 10, 1967, November 16, 1967 and December 7, 1967 at the office of the Respondent, 123 William Street, New York, New York.

SIXTH: During the course of the hearing, and on May 8, 1967, the department moved to amend the Citation to allege that Dr. Zucker had issued additional eyeglasses to eligible Fund members and their dependents during the period covered by the Citation.

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Petition to Review the Determination of the Superintendent of Insurance

SEVENTH: After such hearing and on April 3, 1968, the Hearing Officer rendered a determination finding the aforesaid Petitioners guilty of the specifications charged in the citation and ordered that Petitioner Murray Solomon be removed as Trustee and Administrator of the Fund and fined him the sum of $2,500.00 and found assets had been depleted in the sum of $138,130.90 by reason of the wrongful and negligent acts and omissions of Petitioners and held all Petitioners other than Hauck and Papalexis to be jointly and severally liable therefor, and Petitioners Hauck and Papalexis, similarly liable for $93,620.88. The Hearing Officer also directed that a copy of his determination and findings be transferred to the Attorney General of the State of New York pursuant to Insurance Law Section 37-1.6, so that the Attorney General might commence a civil action aginst Petitioners to recover the aforesaid sums.

EIGHTH: On April 5, 1968, Respondent approved and adopted the aforesaid Findigs, Orders and Decision. In so doing, he also ordered the publication of the Report on Examination of the Fund rendered July 30, 1964 for the purpose, among others, of sustaining the charges against Petitioners. (The aforesaid Statement, Findings of Fact, Decision and Conclusions and Respondent's Approval thereof is annexed hereto and made a part hereof as Exhibit "C").

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NINTH: On the entire record, there was no substantial evidence to support the Findings and Decision herein.

1. There was not a scintilla of probative, competent or other legal evidence introduced by any party to prove the following necessary elements of the Department's case.

(a) That the monies paid by the Fund to Dr. Zucker were more than the average paid by other funds to other optometrists rendering services substantially similar to those rendered by Dr. Zucker to the fund.

(b) That Dr. Zucker's services were at least substantially similar to the services rendered by other optometrists to certain other welfare funds, fifty-five in number, with which comparison was sought to be made by the Department at the hearing.

(c) The number of pairs of eyeglasses actually issued by dr. Zucker to eligible members of the Fund and their dependents during the years 1060-1965, inclusive, the years during which the Department claimed there were overpayments to Dr. zucker.

(d) The portion of the monies paid by the Fund to Dr. Zucker which were attributable to the services rendered by Dr. Zucker other than for the furnishings of eyeglasses.

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(e) That notice was given to Petitioners other than Murray Solomon that the Department desired the Petitioners to obtain competitive bids, make comparative cost studies and obtain utilization data to indicate the extent to which Dr. Zucker's services were being availed of by eligible Fund members.

(f) That such utilization data was not obtained within a reasonable time after notice was given by the Department to Petitioner Solomon and that Petitioner Solomon and other Petitioners willfully failed to comply with the Department's notice or request.

(g) The extent and nature of the Petitioners' fiduciary obligation.

2. The Reports and Examination of the fifty-five (55) other welfare funds with which comparison was made by the Department were relied upon as presumptive evidence of the facts stated therein notwithstanding:

(a) That these Reports were irrelevant in that they did not report on optometric benefits which were substantially similar to those provided by Dr. Zucker to the Fund; they did not contain sufficient information upon which a qualified analyst thereof could conclude that these fifty-five funds paid an average price of $6.19 per pair of eyeglasses during the period 1960-1965

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inclusive; and the welfare funds covered by these Reports did not employ the same method of payment used by the Fund and Dr. Zucker.

(b) The witness, investigator Murray Zaroff, through whom these fifty-five Reports were introduced into evidence, had no personal knowledge of the matters contained in the fifty-five Reports and had no connection whatsoever with their preparation, but he was merely assigned by the Department to analyze these Reports for purposes of this proceeding.

3. Department investigator Zaroff, who also compared the Fund's payments to Dr. Zucker with the payments made by other welfare funds to optometrists for eyeglasses only, was totally unqualified to make such analysis and comparison and, in fact, made an analysis necessarily relied upon by Respondent, which was totally illogical, irrational and unreasonable, and which completely ignored the services actually rendered by Dr. Zucker to the Fund and the actual value thereof.

4. The patient record cards introduced into evidence by the Department, purportedly to show the total number of visits by members and dependents of the Fund, were not proved by competent and probative evidence to have been Dr. Zucker's cards, nor all of the cards for the years 1960-1965 inclusive, nor all of the

cards examined by Department investigators during their prior search of Dr. Zucker's office.

TENTH: All of the said Findings, Orders and Decisions of the respondent were erroneous as a matter of law, arbitrary and capricious, constituted an abuse of discretion and were made in utter disregard and violation of lawful procedure and due process of law, by reason of the following facts:

1. Petitioners repeat and reallege the allegations of paragraph NINTH as if set forth in full at this point in the petition.

2. The Report on Examination of the Fund dated as of December 31, 1961 and certified by the examiner on July 31, 1964, was admitted into evidence and relied upon by the Respondent as presumptive evidence of the facts stated therein notwithstanding:

(a) It was entirely hearsay, being merely an investigative report of matters to tally without the personal knowledge of the author of the Report.

(b) That the Report was not made in compliance with the requirements of the Insurance Law in that it contained "facts" not appearing upon the books and records of the Trustees of the Fund and not ascertained from sworn testimony of witnesses taken under oath; there was no order by the Respondent defining the scope of the examination; and the Report included events and

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"facts" pertaining to years subsequent to December 31, 1961, the terminal date of the Report.

(c) The Report was not "published" by the Respondent until after the hearing.

(d) One of the essential bases for the alleged facts contained in the Report was the testimony given by Petitioner Murray Solomon, which had been taken by a Department examiner who failed to advise said Petitioner of his right to remain silent and his right to counsel prior to the interrogation.

(e) The Report was the product of several authors and investigators of whom all but one were not produced by the Department for cross-examination at the hearing.

3. The Reports on Examination of the fifty-five other welfare funds with which comparison was sought to be made were admitted into evidence and were also relied upon as presumptive evidence of the facts stated therein notwithstanding:

(a) That there was no foundation evidence introduced to prove that any of these Reports on Examination were prepared and rendered in compliance with Article 3-A of the Insurance Law.

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Petition to Review the Determination of the Superintendent of Insurance

(b) That such Reports were not published by the Respondent prior to their admission into evidence, and, furthermore, the previous filing of these Reports was not consented to by the Fund and the Insurance Law does not authorize the admission of these Reports into evidence against this Fund.

(c) These Reports were entirely hearsay, including the hearsay statements of the third parties, and the conclusions of Departmental investigators who were not produced for cross-examination at the hearing, despite demand therefor.

(d) These Reports were not the best evidence of the alleged facts set forth therein and in at least thirty-four instances the actual written contracts for optical services entered into by thirty-four of these welfare funds were not produced by the Department as the best evidence, despite demand therefor.

(e) The witness, investigator Murray Zaroff, through whom these fifty-five Reports were introduced into evidence, had no personal knowledge of the matters contained in the fifty-five Reports and had no connection whatsoever with their preparation, but was merely assigned by the Department to analyze these Reports for purposes of this Proceeding.

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4. The Respondent based his Findings, Decisions and Orders solely on hearsay and other incompetent evidence, without which such decision adverse to Petitioners could not have been made and without which there is insufficient legal evidence to sustain said Findings and Decision.

Among the hearsay on which the Hearing Examiner and Respondent relied are:

(a) The Report on Examination of the Fund, dated December 31, 1961, and rendered on July 30, 1964.

(b) The Reports on Examination of fifty-five (55) other welfare funds, none of which was in any was connected with the Fund or this proceeding.

(c) The testimony of Department investigator Zaroff, that Dr. Zucker stated to him that the records such investigator was to examine "were all the records of the people he had treated".

(d) The testimony of Department investigator Max Friedwald, as to what Dr. Zucker said to investigator Zaroff.

(e) The Special Investigator Reports of investigator Zaroff, dated January 26, 1967, and April 21, 1967, which Reports were actually the work product of twenty-one Department investigators and/or clerks, none of whom was produced for cross-examination

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despite demand therefor.

(f) Conclusory testimony and written findings and analyses by investigator Zaroff of his investigation of the optical benefits as reported in the aforesaid fifty-five Reports on Examination, all of which constituted multiple hearsay without any possible probative value.

(g) Written worksheets totalling 181 pages and others totalling 33 pages prepared by at least twenty persons other than investigator Zarrof, none of whom was produced for cross-examination despite demand for them, which worksheets purportedly contained a complete listing and analysis made in Dr. Zucker's office and in Department offices, of Dr. Zuckers' patient cards and which puportedly showed the total number of visits to Dr. Zucker made by Fund members and their dependents during the years 1960-1965, inclusive.

5. In addition to all of the aforesaid persons who were not produced for cross-examination by the Department, the Department also refused to produce for examination various supervisory officials who alone had personal knowledge of whether the aforesaid special investigations were properly authorized and the reports thereof properly published, and the circumstances related thereto.

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6. In addition to the documents already mentioned, the Hearing Officer erroneously and arbitrarily precluded the Petitioners during the course of the hearing from inspecting, examining, and/or introducing into evidence the following documents in connection with the cross-examination of various Department witnesses:

(a) The Reports on Examination of all welfare funds in Department files which reported on optical benefits, including those with services similar to those rendered by Dr. Zucker to the Fund and whose method of payment was similar to that employed by the Fund with Dr. Zucker.

(b) The thirty-four written contracts underlying thirty-four of the fifty-five Reports on Examination introduced into evidence by the Department.

(c) Various handwritten draft reports, notes and memoranda prepared by investigators Bukzin and Zaroff.

7. In light of his prior acceptance of the hearsay testimony of investigators Zaroff and Friedwald, the Hearing Officer abused his discretion, by arbitrarily and erroneously refusing to admit into evidence, for the truth of statements therein contained, the transcript of the sworn testimony of Dr. Zucker taken by the Department on December 12, 1966, pursuant to subpoena, the

APPENDIX 2

Petition to Review the Determination of the Superintendent of Insurance

substance of which was that at the time these Department investigators examined his records in August, 1966, Dr. Zucker no longer had all of the Fund's patients' record cards.

8. The Hearing Officer, over objection, abused his discretion to Petioners' detriment, in allowing the Department, without just cause to reopen its case and present further evidence against Petitioners six months after the Department had rested its case against them, and after Petitioners had previously moved to dismiss the Department's case after the Department had rested, based upon the insufficiency of the evidence.

9. By reason of the foregoing arbitrary, illegal and erroneous acts and rulings of the Department and the Hearing Officer, all of which were sanctioned and approved by the Respondent, each and every Petitioner:

(a) was denied a reasonable opportunity to test and controvert adverse evidence and witnesses and each was consequently denied a fair hearing;

(b) was deprived of his rights under Section 23 of the New York Insurance Law by having been denied a reasonable opportunity to inspect all adverse documentary proof, to examine and cross-examine witnesses and to present proof in support of his interest;

(c) was denied such due process and a fair trial, constituting a deprivation of

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his rights under Article 1, Section 6 of the New York State Constitution;

(d) was deprived of his rights to be confronted with the witnesses against him under the Sixth Amendment to the United States Constitution, as incorporated in the Fourteenth Amendment thereof.

10. The application herein of Insurance Law Section 37-e to cause all of the aforesaid Reports on Examination and investigation reports to be admitted as presumptive evidence of the facts stated therein deprived Petitioners of all of their aforesaid constitutional and statutory rights, and further, said law was applied discriminatory in that the Hearing Officer refused to order the Department to produce other relevant Reports on Examination.

11. Insurance Law Section 37-e(2) is unconstitutional on its face in that it deprives petitioners of their right to confront the witnesses against them guaranteed by the Sixth Amendment of the United States Constitution and by Article 1, Section 6, of the New York State Constitution, and creates an invalid presumption violative of due process.

ELEVENTH: A stay of further proceedings and of execution and enforcement of the Orders of Respondent made on April 5, 1968, pending the disposition of this proceeding or until further direction of the Appellate Division will not unduly injure the interests of the

APPENDIX 2

Petition to Review the Determination of the Superintendent of Insurance

people of the State of New York.

TWELFTH: No previous application for the relief sought herein has been made to any Court or judge.

WHEREFORE, your Petitioners pray (1) for a final order and judgment herein dismissing annulling, reversing and setting aside the Findings, Decision and Orders heretofore made by Respondent on April 5, 1968, on the law and on the facts, and (2) for an order under CPLR 7804(g) transferring this proceeding to the Appellate Division of the Supreme Court, First Judicial Department, and in the interim, (3) for a further order staying further proceedings and enforcement of the aforesaid Decision and Orders pending the disposition of this proceeding or until further direction by the Appellate Division, and for such other and further relief as may be just and proper.

Dated: July 24, 1968

ARANOW, BRODSKY, BOHLINGER,
EINHORN & DANN
Attorneys for Petitioners
122 East 42nd Street
New York, N. Y. 10017
MU 7-6343

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Petition to Review the Determination of the Superintendent of Insurance

Duly Verified By:

Harry Greenseid
George Papalexis
Elmer Hauck
Arthur Russell
William Donovan
Murray Solomon

July 24th, 1968

John Leonidas
July 25th, 1968

APPENDIX 3

Opinion of the Appellate Division

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION : FIRST DEPARTMENT

In the Matter of the Application of

HARRY GREENSEID, et al.,

Petitioners,

-against-

RICHARD E. STEWART, SUPERINTENDENT OF INSURANCE OF THE STATE OF NEW YORK,

Respondent.

PER CURIAM:

This proceeding under article 78, CPLR, transferred here from Special Term by consent, brings up for review a determination of respondent Superintendent of Insurance by which, in a proceeding instituted under Article III-A, Insurance Law, certain penalties were visited by him upon the trustees of Local No. 11 Welfare Trust Fund (respondents in that inquiry, petitioners here).

[1] The subject Welfare Fund's operations in respect of optical services rendered by it to union members during the

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period 1960 through 1965 were considered in an inquiry initiated by a citation directed to the trustees, by which they were called upon to show cause why they should not be removed from office, assessed with a fine, and "charged with depletion of fund assets." The major derelictions of duty specified were that improvident contracts had been made with a certain doctor to render optical services to union members, that the rendering of such services was improperly supervised, that improper and insufficient records of such services were kept, and that the Welfare Fund was substantially depleted by overcharges for such services far in excess of what they should have cost. A lengthy hearing was held before a departmental hearing officer, which resulted in findings of fact, a decision, and conclusions, all of which were approved and adopted by the respondent Superintendent. The hearing officer found the petitioning trustees guilty of the specifications of neglect and nonfeasance in having permitted improvident contracts to be entered into for optical services provided by the Welfare Fund, in having failed to terminate such contracts, in having neglected adequate record-keeping, and in consequently having suffered depletion of the Welfare Fund. Trustee Solomon, who was the Welfare Fund's administrator, was ordered removed from both posts and fined the statutory maximum of $2,500 (sec. 37-2[6] Insurance Law). The petitioning trustees (and others) were

APPENDIX 3

Opinion of the Appellate Division

adjudged jointly and severally responsible for depletion of the Welfare Fund in the total sum of $138,130.90, with some of them held accountable for a smaller part thereof, proportioned to their respective periods of service as trustees. It was established by ample evidence that the trustees did not fulfill their duties of supervision, of maintenance of adequate records, and of conservation of the assets of the Welfare Fund. The paucity of records and the failure of the trustees and their employees to make adequate explanation of their conduct led inevitably to the findings and conclusions stated by the hearing officer (see White v. Rankin, 18 A.D. 293, 46 N.Y.S. 228, aff'd 162 N.Y. 622, 57 N.E. 1128).

As far as the trustees did not prevent by their conduct in withholding or failing to give information or to keep records, substantial compliance with the statute (secs. 37-c, 37-d, 37-e, 37-h, 37-l, 37-n Insurance Law) is found in the record. Standards of due process are found to have been adhered to (Steward v. Citizens Casualty Co., 23 N.Y. 2d 407, 297 N.Y.S. 2d 115, 244 N.E. 2d 690, 1968), with one exception, related to those portions of the hearing officer's report hereinafter directed to be vacated. The amount of depletion assessed against the trustees represents what the hearing officer found to have been the difference between what the optical services rendered actually cost the Welfare Fund under the improvident

APPENDIX 3

Opinion of the Appellate Division

contracts and what they should have cost. The policy of secretiveness pursued by the establishment controlling the Welfare Fund necessitated employment of expedients to determine the factor of what the cost should have been. It was presumed by the hearing officer that every card of the meagre records actually produced represented a pair of eyeglasses supplied, and this figure was established as the number of units as to which cost calculation should be made.

The figure deemed to be the proper price for an individual pair of eyeglasses was arrived at by introducing into evidence fifty-five reports (Exhibits 17-17bbb) made by respondent's examiners of what were said to be similar welfare funds supplying similar services, and by averaging out the price paid per pair of spectacles by each such fund. There is no doubt that such reports are "presumptive evidence of the facts stated therein" (sec. 37-e[2] Insurance Law), and this was the basis for their having been received in evidence. So much for their competence. But counsel for the trustees was prevented from conducting any meaningful examination into their *relevance* as a standard of comparison measurable against prices paid by the subject Welfare Fund. The hearing officer was content with the bald assurance of the departmental examiner that, out of the many reports in the departmental files, these fifty-five were the only ones

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Opinion of the Appellate Division

comparable in coverage to the Local 11 Welfare Fund. No inquiry was permitted to be made into the service contracts of the other funds to ascertain their comparability with this Welfare Fund's contracts as to type of service rendered; no inquiry was permitted as to welfare funds other than the fifty-five (approximately 100 such) to ascertain whether they were comparable and should have entered into the calculation. To repeat, the sole basis for a finding of relevance was the examiner's assurance that these fifty-five reports, and no others, were relevant, and that, based on an average of the fifty-five, the proper price for a pair of eyeglasses was $6.19. Thus, a muzzle was placed on inquiry into relevance, which is far from basic due process. It is no answer to say that the documents as to which inquiry was frustrated were all subject to subpoena by the trustees, for copies were in the possession of the very agency which would have issued the subpoenas: i.e., the Department of Insurance, which could easily have avoided circumlocution by quick production as requested. Nor, based on the hearing officer's attitude as reflected in the record, was there any real possibility of their having been considered even if produced under subpoena. The argument that confidentiality prevented their production is footless for other reports in evidence lost their confidentiality by an instant publication process controlled by respondent.

APPENDIX 3

Opinion of the Appellate Division

The separate appeal of trustee Cox endeavors to have established for a trustee of an employee welfare fund a standard somewhat less than that set up in simple English by Article III-A, Insurance Law: "The trustees of every employee welfare fund shall be responsible in a fiduciary capacity for all money, property, or other assets received, managed or disbursed by them, or under their authority, on behalf of such fund." (sec. 37-7[1]). The argument is without merit.

Therefore, while the hearing officer's basic findings, conclusions and decision may stand, there is no acceptable proof as to the proper calculation of the amount of depletion, and those findings and conclusions relating thereto should be stricken, without prejudice to the right of the attorney general to establish the amount of the same by proper proof in any action he may bring against the trustees to recover depletion (sec. 37-7[6] Insurance Law). The portions which should so be stricken are findings of fact numbered 28 and 29, those portions of the decision which purport to fix the average cost of eyeglasses at $6.19 per pair and to state an amount of depletion for the years 1960 through 1965, that portion of the conclusions numbered II, and schedules 1 and 2 appended thereto, and, as so modified, the determination made by respondent Superintendent on April 5, 1968, should be confirmed, on the law, with costs and disbursements.

APPENDIX 3

Opinion of the Appellate Division

Determination of the respondent unanimously modified, on the law, with $50 costs and disbursements to the respondent, by striking from the hearing officer's basic findings, conclusions and decision those findings and conclusions relating to the proper calculation of the amount of depletion, without prejudice to the right of the Attorney General to establish the amount of the same by proper proof in any action he may bring against the trustees to recover depletion. The portions which are stricken are findings of fact numbered 28 and 29; the portions of the decision which purport to fix the average cost of eyeglasses at $6.19 per pair and to state an amount of depletion for the years 1960 through 1965, and the portion of the conclusions numbered II, and Schedules 1 and 2 appended thereto; and, as so notified, the determination is confirmed.

All concur.

APPENDIX 4

Order of the Appellate Division,
First Department

At a term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York, on the 2nd day of April, 1969.

PRESENT:

HON. LOUIS J. CAPOZZOLI,
Justice Presiding,
HON. OWEN McGIVERN
HON. ARTHUR MARKEWICH
HON. EMILIO NUNEZ
HON. ARON STEUER,
Justices.

In the Matter of the Application of
HARRY GREENSEID, et al.,

Petitioners,

-against- 231

RICHARD E. STEWART, SUPERINTENDENT OF
INSURANCE OF THE STATE OF NEW YORK,

Respondent,

Pursuant to Article 78 of the
Civil Practice Law and Rules.

APPENDIX 4

Order of the Appellate Division, First Department

In the Matter of the Application of AUSTIN B. COX, Individually and as a former Trustee of Local No. 11 Welfare Trust Fund,

Petitioner,

-against- 232

RICHARD E. STEWART, SUPERINTENDENT OF INSURANCE OF THE STATE OF NEW YORK,

Respondent,

Pursuant to Article 78 of the Civil Practice Law and Rules.

The above named petitioners, having moved at Special Term of the Supreme Court, New York County, pursuant to Article 78 of the Civil Practice Law and Rules, for a review by the court of a determination of the respondent finding petitioners guilty of causing a depletion of fund assets,

And these proceedings having been transferred by orders of said Court, entered on October 10, 1968 and November 18, 1968, to this Court for review and determination,

And said proceedings having duly come on to be heard before this Court and having

APPENDIX 4

Order of the Appellate Division, First Department

been argued by Mr. Robert Roy Dann, of counsel for the petitioners Harry Greenseid, et al., by Mr. Murray Gartner, of counsel for the petitioner Austin B. Cox, and by Mr. Philip Weinberg, of counsel for the respondent; and due deliberation having been had thereon, and upon the Opinion of this Court filed herein,

It is unanimously ordered that the determination of the respondent be and the same hereby is modified, on the law, with $50 costs and disbursements to the respondent, by striking from the hearing officer's basic findings, conclusions and decision those findings and conclusions relating to the proper calculation of the amount of depletion, without prejudice to the right of the Attorney General to establish the amount of the same by proper proof in any action he may bring against the trustees to recover depletion. The portions which are stricken are findings of fact numbered 28 and 29; the portions of the decision which purport to fix the average cost of eyeglasses at $6.19 per pair and to state an amount of depletion for the years 1960 through 1965; and the portion of the conclusions numbered II, and Schedules 1 and 2 appended thereto; and, as so modified, the determination is confirmed.

ENTER:

HYMAN W. GAMSO,
Clerk

APPENDIX 5

Notice of Appeal to
New York Court of Appeals

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

In the Matter of the Application of

HARRY GREENSEID, et al.,

Petitioners-Appellants,

-against-

RICHARD E. STEWART, SUPERINTENDENT OF INSURANCE OF THE STATE OF NEW YORK,

Respondent-Respondent,

Pursuant to Article 78 of the
Civil Practice Law and Rules.

SIRS:

PLEASE TAKE NOTICE that the Petitioners, Harry Greenseid, George Papalexis, Elmer Hauck, John Leonidas, Arthur Russell, William Donovan and Murray Solomon, hereby appeal to the Court of Appeals of the State of New York from an Order of the Appellate Division, First Judicial Department, entered in the office of the Clerk of said Appellate Division on the 2nd day of April, 1969, which Order modified on the law, the

APPENDIX 5

Notice of Appeal to New York Court of Appeals

determination of the Respondent, the Superintendent of Insurance, and, as so modified, confirmed said determination.

PLEASE TAKE FURTHER NOTICE that the Petitioners appeal from each and every part of said Order of the Appellate Division of the Supreme Court for the First Judicial Department except so much of the Order which strikes certain findings, conclusions and portions of the decision from the Respondent's determination.

Dated: New York, New York
April 21, 1969.

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APPENDIX 6

REMITTITUR, OPINION, ORDER AND JUDGMENT OF NEW YORK COURT OF APPEALS

COURT OF APPEALS

STATE OF NEW YORK, SS:

PLEAS in the Court of Appeals, held at Court of Appeals Hall, in the City of Albany, on the 27th day of April in the year of our Lord one thousand nine hundred and seventy-two, before the Judges of said Court.

WITNESS,

The HON. STANLEY H. FULD,
Chief Judge, Presiding.
RAYMOND J. CANNON, Clerk.

REMITTITUR April 27, 1972.

THEREFORE, it is considered that the said order be modified & c., as aforesaid.

And hereupon, as well the Notices of Appeal and return thereto aforesaid as the judgment of the Court of Appeals aforesaid, by it given in the premises, are by the said Court of Appeals remitted into the Supreme Court of the State of New York before the Justices thereof, according to the form of the statute in such case made and

APPENDIX 6

REMITTITUR, OPINION, ORDER AND JUDGMENT OF NEW YORK COURT OF APPEALS

provided, to be enforced according to law, and which record now remains in the said Supreme Court, before the Justices thereof, &c.

s/ Raymond J. Cannon

Clerk of the Court of Appeals of the State of New York

COURT OF APPEALS, CLERK'S OFFICE,)
Albany, April 27, 1972.)

[SEAL OF THE STATE OF NEW YORK COURT OF APPEALS]

I HEREBY CERTIFY, that the preceding record contains a correct transcript of the proceedings in said cause in the Court of Appeals, with the papers originally filed therein, attached thereto.

s/ Raymond J. Cannon

Clerk.

APPENDIX 6

REMITTITUR, OPINION, ORDER AND JUDGMENT OF NEW YORK COURT OF APPEALS

---

1. No. 286 1969

In the Matter of the Application of Harry Greenseid, & ors.,

Appellants-Respondents,

vs.

Richard E. Stewart, Superintendent of Insurance of the State of New York,

Respondent-Appellant.

BE IT REMEMBERED, That on the 10th day of June in the year of our Lord one thousand nine hundred and sixty-nine, Harry Greenseid, & ors., the appellants-respondents in this cause, came here unto the Court of Appeals, by Aranow, Brodsky, Bohlinger, Einhorn & Dann, their attorneys, and filed in the said Court a Notice of Appeal and return thereto from the order of the Appellate Division of the Supreme Court in and for the First Judicial Department. And Richard E. Stewart, Superintendent of Insurance of the State of New York, the respondent-appellant in said cause,

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REMITTITUR, OPINION, ORDER AND JUDGMENT OF NEW YORK COURT OF APPEALS

afterwards appeared in said Court of Appeals by Louis J. Lefkowitz, Attorney-General, and also filed a Notice of Appeal.

Which said Notices of Appeal and the return thereto filed aforesaid are hereunto annexed.

WHEREUPON, The said Court of Appeals having heard this cause argued by Mr. Robert Roy Dann, of counsel for the appellants-respondents, and by Mr. Philip Weinberg, of counsel for the respondent-appellant, and after due deliberation had thereon, did order and adjudge that the order of the Appellate Division of the Supreme Court appealed from herein be and the same hereby is modified by reinstating that part of the hearing officer's basic findings, conclusions and decision, relating to the proper calculation of the amount of the depletion, which were struck by the Appellate Division, and, as so modified, affirmed, without costs. Taking the record as a whole, we find substantial competent evidence to support the entire determination made by the Superintendent and conclude that the trustees have failed to demonstrate that the administrative proceedings were tainted by any irregularities or a denial of procedural due process.

And it was also further ordered, that the records aforesaid, and the proceedings

APPENDIX 6

REMITTITUR, OPINION, ORDER AND JUDGMENT OF NEW YORK COURT OF APPEALS

in this Court, be remitted to the Supreme Court of the State of New York, there to be proceeded upon according to law.

APPENDIX 7

Order of New York Court of Appeals

STATE OF NEW YORK,

In Court of Appeals

At a Court of Appeals for the State of New York, held at Court of Appeals Hall in the City of Albany on the Eighth day of June A.D. 1972

PRESENT,

HON. STANLEY H. FULD,

Chief, judge, presiding.

Mo. No. 464
In the Matter of the Application of Harry Greenseid &ors., as Trustees of Local No. 11 Welfare Trust Fund,

Appellants,

vs.

Richard E. Stewart, Superintendent of Insurance of the State of New York,

Respondent,

Pursuant to Article 78 CPLR.

APPENDIX 7

Order of New York Court of Appeals

A motion to amend the remittitur in the above cause having heretofore been made upon the part of the appellants herein and papers having been submitted thereon and due deliberation having been thereupon had, it is

ORDERED, that the said motion be and the same hereby is denied.

[SEAL]

A copy

S/ Benson Kimball

Deputy Clerk

FILED
SEP 7 1972
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-141

In the Matter of the Application of HARRY GREENSEID, GEORGE PAPALEXIS, AUSTIN B. COX, SAM WEISS, ERNEST GUGGENHEIM, JOHN R. MURPHY, BENJAMIN WALLACK, ELMER HAUCK, JOHN LEONIDAS, ARTHUR RUSSELL, WILLIAM DONOVAN and MURRAY SOLOMON, individually and as Trustees of Local 11 Welfare Trust Fund,

Petitioners,

v.

RICHARD E. STEWART, Superintendent of Insurance of the State of New York,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-141

In the Matter of the Application of HARRY GREENSEID, GEORGE PAPALEXIS, AUSTIN B. COX, SAM WEISS, ERNEST GUGGENHEIM, JOHN R. MURPHY, BENJAMIN WALLACK, ELMER HAUCK, JOHN LEONIDAS, ARTHUR RUSSELL, WILLIAM DONOVAN and MURRAY SOLOMON, individually and as Trustees of Local 11 Welfare Trust Fund,

Petitioners,

v.

RICHARD E. STEWART, Superintendent of Insurance of the State of New York,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

Opinions Below

The opinion of the Appellate Division of the Supreme Court of the State of New York, First Department, is reported at 298 N.Y.S. 2d 607, 31 A.D. 2d 454. The opinion of the Court of Appeals modifying the order of the Appel-

late Division and confirming the determination of the State Superintendent of Insurance in all respects is reported at 284 N.E. 2d 152, 30 N.Y. 2d 730. The order of the Court of Appeals denying the petitioners' motion to amend the remittitur is not yet reported. They are reproduced at pp. 50a-56a, 62a-66a, and 67a-68a of the appendix to the petition for certiorari.

Jurisdiction

Petitioners invoke this Court's jurisdiction pursuant to 28 USC 1257(2).

Questions Presented

1. Was the determination of the New York Superintendent of Insurance that petitioners, trustees of an employee welfare fund, were responsible for the depletion of the assets of that fund resulting from repeated enormous overpayments for eye-glasses for fund members and dependents, consistent with due process of law?

The Court of Appeals held that it was.

2. Is New York Insurance Law § 37-e, which provides that reports of examinations and investigations are "admissible in evidence and shall be presumptive evidence of the facts therein" in administrative proceedings against trustees of employee welfare funds, constitutional as applied to petitioners?

The Court of Appeals held that it was.

3. Did petitioners properly preserve their objections under the Fourteenth Amendment by asserting them in the state courts?

This issue was not explicitly decided by the state courts.

Constitutional and Statutory Provisions

The pertinent provisions of the Constitution (Sixth and Fourteenth Amendments) and statutes (N. Y. Ins. Law §§ 24-1, 37-e and 37-l) are set forth in the petition at pp. 3-6.

Statement of the Case

This petition seeks further review of a determination of the Superintendent of Insurance which was unanimously confirmed in all respects by the New York Court of Appeals.

Petitioners are trustees of the Local No. 11 Welfare Trust Fund (herein "Fund"), an employee welfare fund established by a local of the Chain Service Restaurant, Luncheonette and Soda Fountain Employees' Union and its employers. Employee welfare funds are subject to the supervision and control of the New York Superintendent of Insurance pursuant to the strict regulatory scheme of Insurance Law Article 3-A (§§ 37 *et seq.*). As such trustees, petitioners were explicitly made "responsible in a fiduciary capacity for all money, property, or other assets received, managed or disbursed by them, or under their authority, on behalf of such fund" (§ 37-l[1]).

In 1963 the Superintendent of Insurance, pursuant to § 37-d, directed an examination of the Fund and a report of the Department's examiners' findings. This examination resulted in a thorough report, published by authority of an order of the Superintendent dated December 14, 1966. This report, once published by the Superintendent, is "admissible in evidence and shall be presumptive evidence of the facts stated therein" in any proceeding against the trustees of the Fund. Insurance Law § 37-e(2).

The report noted that in 1956 the Fund's contract for optical services, including one pair of eye-glasses annually

per member, cost 17 cents per member per month. Since the Fund has about 4,800 members this amounted to approximately $9,800 per year. In 1960 the Fund contracted with an optometrist, one Zucker, providing for glasses for dependents as well as members, and raising the cost to 50 cents per member per month or approximately $28,800 per year. And in 1962 yet another contract was made with Zucker, this one for a $33,000 annual retainer.

The report of the examiner found that although the trustees had thus spent over $154,000 on optical services for members for the period January 1957 through May 1964, they "did not make a significant effort to ascertain whether equivalent value was received" and had entered into both the original contract and the enormous increases "arbitrarily" and "without cost studies, comparisons with other plans or requests for bids from competitor optical plans."

The report further documented the trustees' failure to maintain a list of Fund members applying for optical care (even though issuing cards to all members and dependents requesting optical services) and their refusal to authorize examination of Zucker's records pertaining to Fund members.

Moreover, the report showed, the trustees actually concealed from their membership the fact that the contracts with Zucker since 1960 provided for free glasses for dependents, so that not only were members "misinformed concerning the availability of a valuable benefit to their families," but "[t]he fund itself suffered financial loss because it was paying Dr. Zucker [on an annual retainer] for a benefit of which the members were not aware." Further investigation revealed that between 1960 and 1965 petitioners had paid $180,780 to Zucker for 4,492 visits, or an average cost of $40.24 per pair of glasses, assuming each visit resulted in a pair of glasses.

The Department's analysis of figures submitted by 55 other welfare funds for the substantially similar optical

services showed that the average cost of glasses was $6.19. Thus, assuming each visit resulted in issuance of a pair of glasses, their real value (at $6.19 per pair), and the resulting depletion of the assets of the Fund (amount paid less real value), would be (30a):

Year	Amount Paid	Value at $6.19 pr.	Depletion
1960	$ 21,165	$ 4,872*	$16,293*
61	29,305	4,444	24,861
62	31,310	4,228	27,082
63	33,000	4,042	28,958
64	33,000	5,453	27,547
65	33,000	4,766	28,234
Total	$180,780	$27,805	$152,975

But, in the utter absence of records by the trustees showing the actual utilization of Zucker's services, the Department gave the trustees the benefit of the postulate that a pair of glasses was issued, not for each visit, but for each authorization card issued by the Fund—and many more cards were issued than visits occurred. Even using this approach, the depth of the depletion of the Fund's assets was still enormous (31a):

Year	Number of Cards issued	Amount Paid	Cost per pr. glasses	Value at $6.19 pr.	Depletion
1960	1,233	$ 21,165	$17.16	$ 7,632*	$13,533*
61	1,092	29,305	26.91	6,759	22,546
62	1,292	31,310	24.23	7,997	23,313
63	1,207	33,000	27.34	7,471	25,529
64	1,114	33,000	29.62	6,896	26,104
65	952	33,000	34.70	5,893	27,107
Total	6,890	$180,780		$42,649	$138,131

* Rounded to nearest dollar.

Disclosure of this squandering of the Fund's assets—over $138,000 in a 6-year period—led to service of a citation charging petitioners as trustees of the Fund with contributing to this depletion, and directing them to appear at a departmental hearing to determine whether they should be removed, charged with such depletion, or fined, pursuant to the responsibilities of the Superintendent under § 37-l.

At the hearing, held before a Deputy Superintendent of insurance, petitioners were represented by counsel throughout. Evidence was adduced that no competitive bids were sought by the trustees at any time and that the trustees made no attempt to determine how many Fund members or dependents used Zucker's services until 1964, long after the examination was in progress. Even more shocking, the trustees kept no records whatever of how many members the Fund referred to Zucker. Petitioners even refused to authorize Insurance Department examiners to inspect Zucker's records.

The Department examiner who prepared the supplemental report testified as to the calculation by the Department's analysts of the average price of $6.19 from the statistics in the 55 reports and the extrapolation of these figures to demonstrate the extent of petitioners' wasting of the Fund's assets. The most extensive cross-examination of this witness, Zaroff, failed to alter his testimony in any meaningful way.

In introducing the 55 reports, the Hearing Officer explicitly affirmed petitioners' "right to subpoena any witnesses under the broad right of subpoena power in connection with these documents as well as any documents such as the contracts used as a basis for those reports." The Department's trial counsel stipulated to "make * * * available" any Department employee they wished to have testify. No such subpoena or testimony was ever requested by petitioners.

Two of the petitioners testified, in effect disclaiming any wrongdoing, but utterly failing to explain or justify the continuous dissipation of the Fund's assets through the guise of the increasingly expensive optical care contracts. Petitioner Solomon's testimony disclosed the trustees' failure to make utilization studies or to take any steps to find out whether the Fund's monies were being spent intelligently until seven months after being directed to do so by the Department. And the Fund's office manager stated petitioners did not know whether every member who was issued a card received glasses, or even whether a majority did so, and that petitioners simply did not know how many eligibles received glasses or even how many visited the optometrist.

The findings and decision adopted by the Superintendent (1a-32a) summarize the factual and legal background in detail, and refer specifically to the purposes of New York's statutory scheme for the supervision of employee welfare funds "to the extent necessary to protect the rights of employees and their families" (Ins. Law § 37; 4a), and to prevent "the exploitation of welfare funds, by unscrupulous individuals" (4a). The Hearing Officer found petitioners depleted the assets of the Fund by paying "excessive and exorbitant sums of money to Zucker for his services and that they failed * * * to keep adequate records relating to the utilization of Zucker's services by fund eligibles," and further by failing to exercise their right to cancel the contracts (14a). Petitioner Solomon was found to have doubly breached his fiduciary obligations both as trustee and as administrator of the Fund (15a).

Petitioners as trustees were accordingly held responsible for the waste and "liable for the funds unreasonably spent if due to any wrongful or negligent act or omission on their part" (17a). The Superintendent calculated the depletion to total $138,131 (as explained at p. 5, *supra*), giving petitioners the benefit of the doubt as to the amount

of glasses purchased by assuming that each card issued by the Fund represented the dispensing of a pair of glasses (21a), even though petitioners' own office manager had testified that they had no idea how many of those who were issued cards ever actually received glasses.

Petitioners were accordingly found responsible for the depletion of the Fund's assets (24a-25a). Petitioner Solomon was removed as trustee and administrator and fined $2,500 pursuant to § 37-l(5) (26a).

The Appellate Division unanimously sustained the determination except as to the portion relative to the computation of the amount of the depletion resulting from petitioners' breach of trust. The Court held it was "established by ample evidence that the trustees did not fulfill their duties of supervision, of maintenance of adequate records, and of conservation of the assets of the Welfare Fund" (52a), adding (*id.*):

> "The paucity of records and the failure of the trustees and their employees to make adequate explanation of their conduct led inevitably to the findings and conclusions stated by the hearing officer (see White v. Rankin, 18 A.D. 293, aff'd 162 N.Y. 622)."

The Appellate Division rejected all petitioners' challenges to the determination save one. It held that "[s]tandards of due process are found to have been adhered to" (52a), except as to the computation of the amount of the depletion assessed against the trustees. As to that figure, the Court agreed with the Superintendent that "[t]he policy of secretiveness pursued by the establishment controlling the welfare fund necessitated employment of expedients to determine the factor of what the cost should have been" (53a). It upheld as competent and, under § 37-e(2), "presumptive evidence," the reports of the 55 similar welfare funds introduced at the

hearing (53a). But it set aside so much of the determination as found the amount of the depletion to be $138,131 (55a):

> "[W]hile the hearing officer's basic findings, conclusions and decision may stand, there is no acceptable proof as to the proper calculation of the amount of depletion, and those findings and conclusions relating thereto should be stricken, without prejudice to the right of the attorney general to establish the amount of the same by proper proof in any action he may bring against the trustees to recover depletion (sec. 37-1[6] Ins. L.)"

As so modified, the determination was confirmed.

The Court of Appeals unanimously modified that order and reinstated the determination of the Superintendent in all respects. It held (65a):

> "Taking the record as a whole, we find substantial competent evidence to support the entire determination made by the Superintendent and conclude that the trustees have failed to demonstrate that the administrative proceedings were tainted by any irregularities or a denial of procedural due process."

Thereafter petitioners moved to amend the remittitur to reflect that the Court of Appeals passed on contentions that the determination violated rights under the Sixth and Fourteenth Amendments. In fact, as noted in the Superintendent's opposing papers, no due process claim under the Fourteenth Amendment was asserted in the pleadings, and it was scarcely referred to even in petitioners' Court of Appeals briefs. (See the petition [46a-47a], referring to due process rights "under Article 1, Section 6 of the New York State Constitution.") The Court of Appeals denied petitioners' motion (67a-68a).

Reasons for Denying Certiorari

None of the contentions advanced by petitioners raise any substantial issue under the United States Constitution. Indeed, their due process claims were expressly limited in their pleadings to asserted denials under the New York State Constitution (46a-47a). No reference whatever to due process under the Fourteenth Amendment was made, and even in the Court of Appeals petitioners heavily relied on the State provision while making but two cursory references to the United States Constitution.

But whether or not the Federal due process claim was properly asserted, it is insubstantial. Petitioners' objections to the determination of the Superintendent, unanimously rejected by the Court of Appeals, amounted to claims that the particular determination was not supported by substantial evidence and rested to some extent on hearsay. These sort of objections to administrative determinations in the economic sphere, where no issue under the First Amendment or the Equal Protection Clause is involved, have been repeatedly held not to raise substantial questions of due process. See *Consolidated Edison Co.* v. *NLRB*, 305 U.S. 197, 229, 230; *Willapoint Oysters, Inc.* v. *Ewing*, 174 F. 2d 676, 690 (9th Cir. 1949), cert. den. 338 U.S. 860 (a case strangely relied on by petitioners); *NLRB* v. *Mackay Radio & Tel. Co.*, 304 U.S. 333, 351 ("The Fifth Amendment guarantees no particular form of procedure; it protects substantial rights."); *Panhandle Eastern Pipe Line Co.* v. *Federal Power Comm'n*, 143 F. 2d 488 (8th Cir. 1944), aff'd 324 U.S. 635. In a wide variety of contexts the factual determinations of both federal and state agencies in the economic sphere have been sustained and their broad discretion noted. *S.E.C.* v. *Chenery Corp.*, 332 U.S. 194, 207; *Murphy* v. *Finch*, 427 F. 2d 338 (6th Cir. 1970); *Great Lakes Airlines, Inc.* v. *C.A.B.*, 294 F. 2d 217 (D.C. Cir. 1961), cert. den. 366 U.S. 965, reh. den. 368 U.S. 872.

The objections that the statutory provision that at the administrative hearing the Department may introduce the reports of its examiners and accountants as "presumptive evidence of the facts stated therein" (Ins. Law § 37-e[2]) violates both due process and the right of confrontation under the Sixth Amendment are likewise insubstantial. The statutory presumption is rebuttable and there was never any suggestion otherwise. See *Matter of Stewart (Citizens Casualty Co.)*, 23 N.Y. 2d 407, 415, 244 N.E. 2d 690 (1968); 27 N.Y. 2d 685, 262 N.E. 2d 215 (1970), cert. den. 401 U.S. 910. The states are free to prescribe the burden of proof and of persuasion before their own administrative tribunals. *Speiser* v. *Randall*, 357 U.S. 513, reh. den. 358 U.S. 860. It is basic that administrative agencies have authority to choose the criteria determinative of an issue of fact and may, in the exercise of their discretion, reject evidence which lacks materiality in view of those criteria. *Panhandle Eastern Pipe Line Co.* v. *Fed. Power Comm'n, supra*, 143 F 2d 488.

The record here overwhelmingly showed the most flagrant disregard of the high level of conduct expected of fiduciaries. *Meinhard* v. *Salmon*, 249 N.Y. 458, 464, 164 N.E. 545, 62 ALR 1 (1928); *Himoff Industries Corp.* v. *Srybnik*, 19 N.Y. 2d 273, 279, 225 N.E. 2d 756 (1967). This welfare fund was, as we have noted, a trust fund held for the benefit of the members and their dependents. Ins. Law § 37-l.

It was shown beyond plausible dispute that petitioners entered into agreements for optical care so improvident—to say the least—that profligate waste of the assets of the Fund members directly resulted. The cost of glasses paid by the members here ranged from 3 to 5½ times the average amount paid by 55 similar welfare funds (21a). In 1965 the Fund expended $34.70 per pair of glasses, assuming a pair was dispensed for every card issued, the assumption, extremely favorable to petitioners, made by the Hearing Officer and adopted by the Superintendent.

That such conduct breached petitioners' fiduciary responsibility to the members of the Fund and their dependents is self-evident, and the courts properly so held. 3 Scott, TRUSTS (3rd Ed.) § 187.2. Moreover, the flat failure of these trustees to make utilization studies, or take any steps whatever to ascertain whether the Fund was getting its money's worth from its increasingly prodigal optical costs, was itself a serious breach of their fiduciary duties.

The Legislature, mindful of the need to guard the assets of employee welfare funds from dissipation through negligence or guile, vested in the Superintendent the most extensive powers of examination, supervision, and enforcement. See *McKay* v. *Stewart,* 29 N.Y. 2d 563, 272 N.E. 2d 887 (1971), cert. den. sub nom. *Cecire* v. *Stewart,* 31 L.ed. 2d 581 (April 3, 1972); *People* v. *Automobile Transporters Welfare Fund,* 17 A.D. 2d 448, 235 N.Y.S. 2d 702 (1st Dept. 1962), aff'd 13 N.Y. 2d 814, 192 N.E. 2d 222, cert. den. 376 U.S. 908. Supervision "to protect the rights of employees and their families" (§ 37) was specifically declared by the Legislature to be "the policy of the state." The Superintendent prescribes the information to be furnished by trustees upon their registration with the Insurance Department (§ 37-b) and may examine the affairs of a fund whenever he sees fit (§ 37-c). Examiners authorized by the Superintendent are to have access to all books and records of the fund and power to examine trustees, fund employees and others under oath (§ 37-d). See *People* v. *Automobile Transporters Welfare Fund, supra.*

Petitioners were afforded every procedural safeguard at the hearing. The reports of the 55 funds, which petitioners contend to have denied their rights to confrontation and due process, were introduced subject to their right to subpoena any witnesses or documents they desired in order to dispute the statistical method of proof employed

by the Department. Petitioners never exercised their right, specifically provided by statute (Ins. Law § 24-l) and by the Hearing Officer, to subpoena material to challenge the sufficiency of the showing that the funds were comparable. This neglect to make the slightest attempt to controvert the Department's showing renders their claim untenable. See *Richardson* v. *Perales,* 402 U.S. 389, 404; *Willapoint Oysters, Inc.* v. *Ewing, supra,* 174 F.2d 676, 692; *Francois* v. *Bushell,* 325 F. Supp. 531, 533-534 (N.D. Cal. 1971). It was incumbent on petitioners, in this administrative proceeding of a civil nature, to rebut the presumed accuracy (see Ins. Law § 37-e[2]) of the reports introduced. Even if there were no such statutory presumption, the record shows that they failed to request the very material or witnesses which they now claim to have been "unconstitutionally" denied them. Although they initially objected to the introduction of the 55 reports, their neglect to even request a subpoena of other reports—after being repeatedly offered the right to examine Department witnesses on this subject even without subpoena—is tantamount to a waiver of the objection.

The necessity of the statistical method employed by the Department was acknowledged by the New York courts in view of what the Appellate Division aptly characterized as petitioners' "policy of secretiveness" (53a). This method was, in addition to being entitled to the presumption of correctness "of the facts stated therein" established by § 37-e(2), a plainly proper means of demonstrating the extent of the flagrant waste of Fund assets. In comparable situations administrative agencies' inferences based, as here, on statistical proof have been sustained where the inferences of wrong-doing were not rebutted and flowed plausibly from the facts. See *Ayrshire Collieries Corp.* v. *United States,* 335 U.S. 573, 590. It has been consistently held that presumptions created by statute are fully permissible so long as, as here, a rational

connection exists between the facts shown and those presumed. *Turner* v. *United States,* 396 U.S. 398, 408-416; *South Carolina* v. *Katzenbach,* 383 U.S. 301, 323, 329-333; *United States* v. *Johnson,* 433 F. 2d 1160 (D.C. Cir. 1970). This is especially true in civil proceedings and where, as is the case here, the presumption is rebuttable—although even conclusive presumptions have been sustained where the requisite rational connection exists. *Cancel* v. *Wyman,* 321 F. Supp. 528, 531 (S.D.N.Y. 1970), app. dism. 441 F. 2d 553; *Jensen* v. *United States,* 326 F. 2d 891 (9th Cir. 1964). The proof employed by the Department's examiners was more than sufficient to reveal the magnitude of this parasitic attack on the Fund by its own trustees, in brazen defiance of their responsibility "in a fiduciary capacity for all money, property or other assets received, managed or disbursed by them" (§ 37-1[1]), and in the utter absence of any explanation. The presumed validity of the sampling was "enhanced by the silence" of petitioners. *NLRB* v. *Ohio Calcium Co.,* 133 F. 2d 721, 727 (6th Cir. 1943).

Contrary to challenge by petitioners (Pet. pp. 16-18), in this administrative proceeding by a regulatory agency a presumption such as § 37-e(2) imposes is fully consonant with due process. Petitioners served in a fiduciary capacity and had a strict duty, both at common-law and under the Insurance Law, to maintain adequate records, keep track of trust funds committed to them for safekeeping, and protect their beneficiaries against the squandering of trust assets which the Insurance Department's investigation revealed. The statutory presumption of correctness of the Department's reports on examination, prepared by its professional staff of experienced civil servants, is a valid exercise of the State's power in this area traditionally subject to stringent supervision. Petitioners' broadside completely fails to rebut the powerful presumption of the statute's constitutionality. *Ferguson* v. *Skrupa,* 372 U.S. 726.

The statistical sampling method of detecting irregularity in adminstrative proceedings has been consistently sustained so long as, as here, adequate opportunity to cross-examine or introduce rebuttal evidence is present. It has been upheld even in criminal prosecutions. See *Holland* v. *U.S.*, 348 U.S. 121, sustaining the use of the net worth method of determining tax evasion. See also *Matter of Stewart (Citizens Casualty Co.), supra,* p. 11. It is the function of the administrative tribunal to resolve conflicting inferences and evaluate the probative value of evidence adduced before it and no constitutional issue is raised by objection to the substantiality of the evidence in a particular case, absent utter arbitrariness—plainly not the case on this record.

Petitioners' remaining arguments are insubstantial. The assertion (Pet. p. 11) that "[o]f the fifty-five reports only five dealt with Optometrists like Dr. Zucker rather than with Opticians" is a meaningless statement since each of the 55 funds was contracting for the furnishing of eyeglasses and under New York Law eyeglasses may be dispensed only on the prescription of a physician or optometrist. Education Law § 7126. Further, if petitioners wished to challenge the comparability of the 55 funds employed in the sampling, their remedy was to subpoena the contracts or examine the Department personnel who prepared the sampling.

It is disingenuous for petitioners to allege that "necessary witnesses were not produced for cross examination despite demand therefor" (Pet. p. 14) when in fact the most thorough and extensive cross-examination of Department examiners took place and petitioners were free to subpoena any witness they saw fit. In any event petitioners had no constitutionally-protected right to have the Department call any particular witness against them. *Cooper* v. *California,* 386 U.S. 58, reh. den. 386 U.S. 988;

People v. *Ruiz,* 39 Cal. Rptr. 641, 643, 228 Cal. App. 2d 703 (1964).

The administrative proceedings against petitioners were purely civil and in no way "quasi-criminal" (Pet. p. 17). They were instituted pursuant to the Insurance Department's statutory responsibilities to protect the members of the employee welfare fund and their dependents.

The cases cited by petitioners are distinguishable and do not advance their position. *United States* v. *Romano,* 382 U.S. 136, dealt with a statutory presumption in a criminal case which was without basis in fact—that mere presence at an unlawful still presumed the defendant's possession, custody or control of the still. Here, the rebuttable presumption is not of guilt—indeed, the proceedings are civil, not criminal—but only of the accuracy of the facts contained in the report prepared by the Department's examining staff.

Powhatan Mining Co. v. *Ickes,* 118 F. 2d 105 (6th Cir. 1951), relied on by petitioners, is inapposite here. There the denial by the Department of the Interior of the petitioners' applications was based on a list of prices charged by undisclosed competitors. The Department refused to divulge the names and rejected the petitioners' demand to show that the price variations "might be due to matters which concerned the shipper and the consumer" (118 F. 2d at 108). Here, on the other hand, the names of the 55 funds appear on their reports and there were no extraneous elements as in *Powhatan* which could affect the computations since the optical services supplied were identical. In addition, the petitioners in *Powhatan* would have had to subpoena competing companies which were parties antagonistic to them in that very proceeding—another factor not present here. Moreover, there was lacking in *Powhatan* the presumption of correctness of the facts contained in the reports established by § 37-e(2). The other case em-

phasized by petitioners, *Matter of Erdman* v. *Ingraham* (Pet. pp. 21-23), a state case, concerned a determination based only on hearsay, and with no opportunity to cross-examine, in contrast to the case at bar.

Although petitioners contend their right of cross-examination was curtailed, the fact is they were allowed the most lengthy and thorough cross-examination of the Department's witnesses. And they had the right to subpoena any other witness, in their behalf—a right which they failed to exercise. Their claims of denial of due process and confrontation are utterly insubstantial, and New York's highest court properly so held.

CONCLUSION

For the foregoing reasons the instant petition for a writ of certiorari should be denied in all respects.

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Respectfully submitted,

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